MODERN COMMERCIAL TEXT-BOOKS

FOR USE IN SCHOOLS AND COLLEGES
AND FOR MEN OF BUSINESS

THE ELEMENTS
OF
COMMERCIAL LAW

THE ELEMENTS

OF

COMMERCIAL LAW

BY

HENRY W. DISNEY, B.A. (Oxon.)

BARRISTER-AT-LAW, LATE LECTURER AT THE LONDON SCHOOL OF ECONOMICS;
LATE A MAGISTRATE OF THE POLICE COURTS OF THE METROPOLIS

FOURTH EDITION

Revised by

M. R. EMANUEL, M.A., B.C.L., Barrister-at-Law

LONDON

MACDONALD AND EVANS

8 JOHN STREET, BEDFORD ROW, W.C. 1

1931

PRINTED IN GREAT BRITAIN BY
RICHARD CLAY & SONS, LIMITED,
BUNGAY, SUFFOLK

PREFACE TO THE FOURTH EDITION

THE many Acts that have been passed since the issue of the last edition of this book have necessarily rendered some of the statements of law in that edition no longer accurate, and in some cases have conferred new rights or created new liabilities for persons concerned in commerce. Outstanding examples are the Bankruptcy (Amendment) Act, 1926, and the Companies Act, 1929, while even such Acts as the Workmen's Compensation Act, 1925, occasionally contain clauses which modify or render obsolete parts of the commercial law as stated in 1922.

The object of the present edition has been to bring this book up to date. At the same time, the aim of the first edition, that "this book is not intended for lawyers or for law students, but for business men and commercial students in schools and colleges," has been carefully followed, and legal technicalities have been avoided.

A slight rearrangement of the Parts has been made, separate Parts being devoted to Principal and Agent and to Partnership, while the parties to contracts have been dealt with under contracts. A new Part, "Arbitration," has been added.

M. R. EMANUEL.

2 Mitre Court Buildings,
Temple, E.C. 4.

PREFACE TO THE THIRD EDITION

THE fact that a third edition of this little book is required shows that it satisfies a demand and that it has been found useful. Complaints have, however, been received of the omission of certain subjects which were not dealt with in former editions. To meet these complaints I have added short sections on Companies, Bills of Sale, Insurance, Patents, Copyright and some other matters. I hope that now as much information will be found in the book as can reasonably be expected in so small a space. As I said in the Preface to the First Edition, this book is not intended for lawyers or for law students, but for business men and commercial students in schools and colleges who wish to gain a sound working knowledge of the legal principles on which business is conducted. I have accordingly tried to avoid legal technicalities, and have not burdened the text by citing authorities for my statements—only as a rule referring to decided cases by way of illustration.

I desire again to thank my friend Mr. William Dulley, Barrister-at-Law, for his valuable assistance in revising the manuscript and proofs and for preparing the Index.

H. W. D.

4 *Elm Court, Temple,*
May 1914.

CONTENTS

PART I

PART II

PART III

PART IV

PART V

PART VI

PART VII

PART VIII

PART IX

PART X

PART XI

PART XII

PART XIII

THE ELEMENTS
OF
COMMERCIAL LAW

PART I

INTRODUCTION

"COMMERCIAL LAW" is an expression incapable of strict definition, but is used to comprehend all that portion of the law of England which is more especially concerned with commerce, trade and business. Its sources are, (1) the Common Law, (2) the Law Merchant, (3) Statute Law.

The Common Law is that great body of law which has never been formally enacted by any legislative power, but is founded upon tradition and the immemorial and general custom of the realm, as interpreted by the judges. As it does not originate in any formal enactment, it is often called "the unwritten law."

The Law Merchant resembles the Common Law in being unwritten, but it depends on mercantile usage, which, having become universal, is recognized by the courts as binding, but which may be of modern origin.

The Statute Law consists of Acts of Parliament, and is often called "the written law" in contradistinction to the Common Law.[1]

Commercial Law is chiefly concerned with the rights and obligations arising out of business transactions. An obligation

[1] In most of the countries of Western Europe, but not in England, the Roman Law is the foundation of the legal system. In Scotland, the Roman Law is of great authority, and is adopted when not inconsistent with the Statute or Common Law.

arises whenever one person has a right, which is enforceable at law, to call upon another person to do something, or to abstain from doing something. Every person has naturally, and apart from agreement, certain rights as against all other persons; thus he has the right of personal liberty, the right of personal security, and the right of property. Anyone who unlawfully infringes any such rights commits a wrong, or, in legal language, a tort. Thus, if A lock up B in a room he infringes B's right of liberty; if C drive along a highway without due care and knock down D and break his leg, he infringes D's right of personal security; and if E wrongfully take away F's horse and use it as his own, he has infringed F's right of property. In each of these cases the person infringing the right of another commits a wrong or a tort. Out of this wrong there arises an obligation on the part of the wrongdoer to compensate the injured person for the wrong done to him; and the latter has a right to the aid of the law to compel the former to make such compensation.

Such a wrongful act may be of so serious a nature that the Crown takes cognizance of it, as being an offence against the public, and punishes the doer of it; the act is then called a crime, but it is none the less a private wrong; and punishment by the Crown does not remove the obligation to compensate the individual. Thus, if by means of a forged document a person were to obtain money from me, he might be imprisoned for the crime of forgery; but in addition I should be entitled to recover from him the sum of which I had been defrauded.

An obligation may also arise through an agreement between individuals, where such agreement involves a promise or undertaking by one to do something, or to abstain from doing something, for the other. If such an agreement gives rise to an obligation, the obligation is in the first place that he who makes the promise shall fulfil his promise; and in the second place, that if he breaks the promise he shall make compensation for the breach to the other party to the agreement.

An agreement which gives rise to an obligation is called a "contract."

Commercial Law is to a great extent a part of the Law of Contract.

The supreme object of commerce is the sale of goods. Therefore the most important branches of Commercial Law are those which relate to the sale of goods, the modes of payment for the goods, and the transport of the goods.

PART II

CONTRACT

NATURE AND FORMATION

Definition.—A contract is an agreement which is enforceable at law.

An agreement takes place when two or more parties declare their consent as to anything which some one or more of them is to do or to abstain from doing.

Consent is the most essential part of an agreement. This consent is generally declared by the acceptance of an offer or proposal. When an offer is accepted, the acceptance usually amounts to a promise; and the offer also becomes a promise by acceptance. Thus, suppose A to say to B, "I will sell you 20 quarters of this wheat at 30*s.* a quarter." This is an offer or proposal. If B in reply says, "I will buy from you 20 quarters at the price you mention," there is an acceptance of the offer. It will be seen at once that the agreement is complete, and that by the acceptance of his offer, A's offer has become a promise to sell 20 quarters of the wheat at 30*s.* a quarter, and B has promised to buy 20 quarters of wheat at that price. But if in reply to A's offer, B were to say, "I will only give you 28*s.*," there is no agreement, and A's offer has not become a promise. In this case, however, B's words amount to an offer from his side; and if A were to say, "I will take the 28*s.* you offer," he has accepted B's offer; there is complete agreement; and A has promised to sell the wheat at 28*s.* a quarter, and B has promised to buy it at that price.

Agreements not Enforceable.—Many agreements are not enforceable at law; or, in other words, many promises are

not legally binding. Agreements may be unenforceable because they are contrary to public policy, or because they have been made void or illegal by statute. Examples will be given later.

An agreement to have any effect at all must be expressed in some manner. It is capable of being expressed either in a written document or by spoken words or merely by conduct, as when a person gets on to an omnibus going along the street, and so without any words agrees to pay the regular fare. In some cases, however, the agreement to be binding must be expressed in writing and in some cases by deed. Of written documents the most important class from a legal point of view are deeds.

Deeds.—A deed is a writing *sealed* and *delivered* by the person making it. The seal is the visible sign of a deed, and the feature that distinguishes a deed from all other documents. A sealed writing has no effect unless it is also "delivered." Delivery takes place when the person making the deed does anything to show that he intends the deed to become operative. Thus, handing the deed to another party to it would be delivering. The usual mode of delivery, however, is by words, the party sealing the deed saying, "I deliver this as my act and deed."

Sometimes a deed after being sealed is handed to a third person not interested, to be held by him until some condition is fulfilled by another party to the deed, and to be delivered to that party on such fulfilment. Thus, the vendor of a piece of land might seal a deed conveying the land to the purchaser, and might hand it to his solicitor to be delivered to the purchaser on payment of the purchase money. While the deed is so held by the solicitor it has not been completely delivered, and is called an "escrow."

In old times a deed might be good without any signature; and although some deeds are now required by various Acts of Parliament to be signed by the parties making them, there is

no general law requiring deeds to be signed. It is, however, now the universal practice for every party to a deed who undertakes any obligation under the deed to sign it; and probably no court would recognize a deed which was unsigned. It is therefore practically correct to say that a deed is a writing signed, sealed, and delivered. The most important contracts in which it is necessary that the agreement should be expressed in writing or by deed in order to be binding are stated below.[1]

Kinds of Contract.—Contracts may be divided into two great classes: I. Contracts by Deed. II. Simple Contracts.

Where an agreement is contained in a deed the agreement constitutes a contract by deed. A promise in a deed is called a covenant; and unless tainted with illegality (as will be explained later), every covenant is binding, as a general rule, upon the person who enters into it.

Every contract made in any way other than by deed is a simple contract. Thus, a contract contained in a formal memorandum of agreement not under seal, a contract made by correspondence, a contract made by spoken words, and a contract made merely by conduct are all simple contracts.

PARTIES TO CONTRACTS

Where any principle of the law of contract is stated, it must be assumed, unless the contrary is expressed or implied, that the parties to the contract are individuals not disqualified or in any way unqualified for exercising the ordinary rights of a citizen. There are, however, many ways in which the right of an individual to make a contract may be restricted by something peculiar to that person; for example, a person under twenty-one years of age cannot, as a general rule, make a contract which is binding upon him. Again, the power of an individual to make contracts may be greatly extended by his appointing agents to act for him. Again, a party to a con-

[1] Pp. 15, 16.

tract may be not an individual but a corporation, which is an artificial person in the eye of the law, capable of suing or being sued. It is therefore necessary to discuss certain parties to contracts.

Infants.—Any person under the age of twenty-one years is in law an infant.[1] By the common law the contract of an infant is voidable, but not void, and the infant has the option either to enforce or to repudiate the agreement. There are, however, exceptions to the general rule. Thus, a contract of apprenticeship, or a contract to work for wages, if fair and reasonable and for the benefit of the infant, is binding upon him. Also, an infant can bind himself by a contract for "necessaries," and when necessaries are sold and delivered to an infant he must pay a reasonable price for them.[2] "Necessaries" include more than such things as are actually necessary for the support of life. All goods which are suitable to the condition in life of the infant and to his actual requirements at the time they are sold and delivered to him are necessaries in law. The first point to consider is the position in life of the infant. Thus, a gold watch may be a necessary for the son of a wealthy man, or for a youth with large financial expectations, for it is an article which such a youth may be expected in the ordinary course of things to have, and which is suitable to his position: but a gold watch may, by the same tests, be quite an unsuitable purchase for the son of a poor man to make. In the first case, the gold watch may well be considered to be a necessary; in the second, not to be a necessary. But in all cases the question is one of fact, to be decided upon the facts of each particular case.

Having decided that a thing sold to an infant is in its nature a necessary, the next point to decide is whether or not he was already adequately supplied with such things. If he was already adequately supplied the thing cannot be a necessary.

[1] Called in Scotland a "minor."
[2] The Sale of Goods Act, 1893, s. 2.

Thus, although a gold watch may be held to be a thing which comes under the head of necessaries in the case of a particular infant, the watch in question cannot be a necessary if the infant was already possessed of a reliable gold watch, and it is immaterial that the jeweller was not aware at the time of sale that the infant was already supplied with a watch. The jeweller cannot recover the price.

It has been stated that, by the common law, the contracts of an infant are voidable, but not void; but a change was made in the law by the Infants' Relief Act, 1874, which provides that all contracts made by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), are absolutely void. Hence, neither the infant nor the other party to such a contract has a right to enforce the contract. The Act also provides that no person is bound by any promise made after coming of age to pay any debt contracted during infancy, or by any ratification after coming of age of any promise or contract made during infancy, whether there be or be not any new consideration for such promise or ratification after full age. This provision applies to all kinds of contracts, not only to those mentioned in the first part of the Act. Hence, if an infant borrow £100, and after reaching full age the money-lender lend him a second £100 in consideration of his signing an agreement to repay both sums, the promise to repay the money borrowed while still under age is void. A great many important contracts are still voidable and not affected by the first-mentioned provision of the Act. Thus, an infant may successfully bring an action for wages or salary, for work done, for rent or for breach of promise of marriage. But if an infant has an action brought against him, he can plead his infancy as a defence, and by so doing he expresses his election to treat the contract as void. The plaintiff then must fail in his action unless it be for necessaries. On the other hand, an infant who has paid money under the terms of a voidable contract cannot recover

the money so paid if he has received any benefit under the contract.

From the foregoing it will be seen that, although there is no law which forbids him to trade, it is a matter of great risk to have business dealings with an infant. Thus, he is not liable in his trading transactions for the price of goods supplied, nor for work done for him; he is not liable on a cheque or bill of exchange; he is not liable for the rent of premises he may hire in which to carry on business; and he is not bound by an account stated.

Married Women.—By the common law all personal property which a woman had at the time of her marriage, or which she acquired while a wife, became the property of her husband, and she was incapable of binding herself by contract. Since the year 1882 the law has been different.[1] The property of a woman married since that year remains her own property after marriage just as if she were single, or as if she were a man; and any property which a married woman now acquires, whether by inheritance or gift, or by her own work, or otherwise, is similarly her own property, and her husband has no rights whatever over such property. Property which belongs to a married woman for her own use, and in which her husband has no legal interest, is called her separate property. Her separate property may be settled upon her in such a way that she cannot touch the capital or anticipate the income. If a married woman make a contract, her separate property which is not settled is liable to be taken to satisfy that contract, or to make compensation for breach of the contract. In respect of such separate property, and to the extent of it, she can bind herself by contract. But it is only her property and not she herself who is bound by the contract. Hence, if she has no separate property, or none except that which is settled, she is not bound by any contract she may make. A judgment may be obtained, however, against the separate property of a

[1] The Married Women's Property Acts, 1882 to 1893.

married woman with which she has power to deal; and if she has no separate property at the time of making a contract, but subsequently acquires such property, that property may be taken to satisfy her debt.

A married woman has no power to pledge the credit of her husband, except as his agent. If she has his authority, express or implied, she may bind him. While a husband and wife are living together, the wife has implied authority to pledge her husband's credit for household or personal necessaries for herself and the other members of the family and household. It is open to the husband, however, to show that in fact she had no such authority. This he can do by proving that he forbade her to buy goods on credit, that he supplied her with sufficient money for necessaries, or that he told the other party not to give credit. When they are living apart, also, she has implied authority to bind her husband for necessaries, unless the separation is due to her misconduct, or unless he has made reasonable provision for her. If the separation is due to the husband's gross misconduct, which makes it unreasonable that she should continue to live with him, she is presumed to have authority to bind him for necessaries, and he is not allowed to rebut this presumption. As soon as a marriage ceases to exist owing to the fact either of death or divorce, the immunity of the woman from personal liability on her contracts comes to an end.

Lunatics.—A contract made by a person who by reason of mental disease is unable to understand its terms or to form a rational judgment of its effect upon his interests is not binding upon him if the other party to the contract know of his condition. Everyone, however, is presumed to be sane until the contrary is proved, and if a man attempt to escape liability upon a contract on the ground of his own insanity, the burden is upon him to prove the state of his mind and also that the other party was aware of it. A man who makes an agreement when intoxicated is not in general entitled to avoid his contract on the ground of his drunkenness; but if he were so drunk that

he did not know what he was doing when he made the agreement, and his condition was obvious to the other party, he is not bound. But where necessaries are sold and delivered to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price for such necessaries.[1] "Necessaries" mean goods suitable to the condition in life of such person, and to his actual requirements at the time he bought them. It need hardly be said that a contract is not affected by reason of a party subsequently becoming insane; or that a person who has suffered, or intermittently suffers, from unsoundness of mind may bind himself by a contract made in a lucid interval.

Convicts.—A person convicted of treason or felony and sentenced to death or to penal servitude is incapable of becoming a party to a contract, except while lawfully at large.

Corporations.—A corporation consists of a number of persons who form one body distinct from the individuals composing it; which body can own property, make contracts, sue, or be sued, as if it were a person. The members of a corporation may continually change, but no change in the identity of the members affects the identity of the corporation, which is an artificial person enjoying perpetual succession, and the existence of which is independent of the life of any of its members.

A corporation can only exist by the authority of the King, expressed in a royal charter, or by letters-patent, or by the authority of Parliament. Some ancient corporations, however, are recognized as such although their origin is unknown. They are said to exist by prescription, and it is assumed that they were created in times long past by a charter which has been lost. Familiar examples of corporations are the Corporation of the City of London (or, more properly, the Lord Mayor, Aldermen, and Commons of the City of London), the Bank

[1] Sale of Goods Act, 1893, s. 2.

of England, the British South African Corporation, the Great Western Railway Company, Lloyds Bank, Ltd.

Every corporation has a common seal, and by common law a corporation can only bind itself by contract provided the seal of the corporation be affixed to the contract. This rule has, however, become subject to numerous exceptions, and it is now well established that a corporation may be bound without seal by the act of the duly authorized agents of the corporation in all matters of small importance and frequent occurrence (such as the appointment of inferior servants, etc.), and also by all contracts made in the ordinary course of the business of a trading corporation and incidental to the purpose for which such corporation exists. Thus, when a colliery company made a contract with an engineer for the purchase of pumping machinery for their mine, in an action for not delivering the machinery the engineer pleaded that there was no binding contract as there was no contract under the seal of the corporation. It was held, however, that the contract was binding, as it was one by a trading corporation entered into for a purpose for which the corporation existed.[1]

A corporation can only make contracts, or do any executive act, through an agent; and the law as to the contracts of a corporation is to a great extent governed by the law of agency, where the corporation is the principal. When the corporation has been created by Act of Parliament or royal charter for a particular purpose, an agent of the corporation cannot have or be given by the corporation any authority to bind the corporation except in accordance with that purpose, as expressed respectively in such Act of Parliament or charter.

Aliens.—An alien (or person who is not a British subject) may, as a rule, own property and make contracts in the United Kingdom on the same footing as a British subject, except that he cannot acquire any share in a British ship. In time of war, however, any person who resides or carries on

[1] *South of Ireland Colliery Co.* v. *Waddle*, L. R. 4, C. P. 617.

business in an enemy country is regarded as an alien enemy and is precluded from entering into any contract with a British subject. And so long as war lasts, an alien enemy may not sue in the courts of this country on any contract made before the war, though he may be sued on such contract. *Also, contracts made before war between British* subjects and alien enemies, if they involve any intercourse between the parties (*e.g.* partnerships), are dissolved by the war. Further, the performance of contracts made before the war with alien enemies is prohibited during war; therefore no action can be brought after the war for the non-performance of such contracts. This rule clearly must in effect dissolve many contracts, such as contracts to deliver goods.

CONSIDERATION [1]

Meaning of Consideration.—A promise made in any manner except by deed is not binding unless some valuable return for the promise is to be made by the person to whom the promise is made. This return is called "consideration." A promise must be supported by valuable consideration in order that the promise may be binding and a simple contract come into existence. A valuable consideration in the legal sense may consist in either any benefit to the person making the promise, *or* any loss, trouble, forbearance, or responsibility to, by, or upon the person to whom the promise is made. In the commonest cases the consideration usually consists of some benefit to the party who makes the promise, and also of some loss or trouble to the person to whom the promise is made. Thus, where an agreement is made between A and B that A shall buy and B shall sell certain goods for a certain price, A promises to pay the price, and the consideration for his promise is the

[1] The doctrine of consideration as stated in this section has no place in Scots Law. In Scotland a consideration is not necessary in contracts by deed or other contracts; and a promise which is not an offer, and does not therefore require acceptance, may be binding without consideration.

benefit to him of becoming the owner of the goods; and this consideration is a loss to B, who parts with the goods. Also in this case B promises to sell the goods, and the consideration to him is the money. It is not necessary, however, that the consideration should be any benefit to the person making the promise, provided it is any loss or trouble to, or forbearance by, or responsibility upon, the other party. Thus, where A promises to pay B money provided B renders some service to C, a third person not a party to the agreement; or where A promises to indemnify B against any loss provided B becomes surety for the debt of C—in neither case is there necessarily any benefit to A; but in the one case B is put to trouble, and in the other he incurs a responsibility because of A's promise, therefore in each case there is good consideration for A's promise. But, if A merely promises to pay B money or to indemnify him against loss without any condition, there is said to be no consideration, and such promise is not enforceable.

A valuable consideration is as a rule either money or something which can be valued in money. Marriage, however, is valuable consideration, and so is the forbearance of any legal right. But although a consideration must be of some value, the law does not generally inquire into the adequacy of the consideration. For example, a promise to pay £5 for a thing only worth 5*s*. would in general be binding unless any fraud were used to obtain the promise. Again, a consideration that is already past before the promise is made is not usually sufficient to support the promise. Thus, where a gratuitous service is rendered by A to B, there being no express or implied agreement that the service is to be paid for, and no request for the service, a promise by B, made after the service has been completely performed, to reward A for the service, is made for a past consideration, and is not binding.

To be sufficient to support a promise, the consideration must be something which the person giving it is not already bound

to give. Thus, Wane owed Cumber £15, and Cumber promised Wane that he would forgive him the rest of his debt if he would at once pay him £5. However, after being paid the £5 Cumber took proceedings to recover the balance, and succeeded; for there was no consideration for his promise to forgive Wane the £10, the apparent consideration (*i.e.* the payment of the £5) being no real consideration, as Wane was already bound to pay that sum.[1] But, if Wane had agreed to pay the £5 even one day before any payment was due, or if there had been a genuine dispute as to the amount due, and the parties had entered into an agreement, by way of compromise, to pay £5, there would have been consideration, and a solid contract. A debt barred by the Statute of Limitations is consideration for a subsequent promise to pay it.

No consideration is necessary in order that a promise in a deed should be binding. Hence a most important distinction between contracts by deed and simple contracts is that in the former a promise is binding without valuable consideration, while in the latter there must be valuable consideration for a promise in order that the promise should be binding.[2]

The agreement which is the foundation of a simple contract may at common law be expressed in any way by which it is possible to express consent, but by statute certain agreements are not binding unless they are expressed in writing or made by deed.

AGREEMENTS WHICH MUST BE BY DEED

The most important contracts in which a deed is necessary are for leases of upwards of three years, for transfers of British ships or any share in them, for conditional bills of sale, for sale of sculpture with copyright, and for sale of shares in companies governed by the Companies Clauses Act, 1845 (relating to certain undertakings of a public nature).

[1] *Cumber* v. *Wane*, 1 Str. 426 and S. L. C.

[2] There is an exception to this in the case of contracts in restraint of

AGREEMENTS WHICH MUST BE IN WRITING

Apart from the agreements stated above in which a *deed* is necessary, there are certain agreements which must be in writing to be enforceable—the most important being bills of exchange, cheques and promissory notes, contracts of marine insurance, assignments of copyright, and of certain rights of action, agreements falling under the provisions of the Statute of Frauds, and agreements for the sale of goods of £10 or upwards. By Section 4 of the Statute of Frauds [1] it is provided that " no action shall be brought : (1) whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or (2) whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; or (3) to charge any person upon any agreement made upon consideration of marriage; or (4) upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or (5) upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

No one of these five contracts, therefore, is enforceable against a party who has broken it unless the contract, or some note or memorandum of the contract, is in writing signed by that party or his agent.

No particular or technical form of writing is required, but words must be used which show with reasonable certainty what the parties mean. Also, each party must either be named

trade. Even a *covenant* in restraint of trade is void unless there be valuable consideration for such covenant. See *post*, p. 30.

[1] 29 Car. II. c. 3. This does not apply to Scotland. In that country contracts relating to land must be in writing; but the other four contracts dealt with in this section of the Act may be binding though made only verbally.

in the writing or so described as to be capable of identification by the description, *e.g.* "the manager of the Victoria Hotel, Blankton," if there is only one hotel of that name in the town. And as an agreement cannot be a simple contract unless it consist of both promise and consideration, it is necessary, in general, that both the promise and the consideration should appear in writing.

In short, the writing must be such as to inform a stranger who the parties are and what each has undertaken to do.

It is not necessary that the writing should be signed by all parties, but it must be signed by the party against whom proceedings are taken to enforce the contract. The signature may be printed, typewritten, or written; it may be made with ink or pencil; it may be made by mere initials, or (in case of an illiterate person) by a mark. The signature to a telegram is sufficient, if the telegraph is used to make the agreement. And if a person gives authority to an agent to make a contract for him, he is bound by the signature of that agent to such contract. It does not matter in what part of the document the signature appears; it may be at the beginning or at the end, provided it is intended to govern the whole document, as, "I, J. S., hereby agree," etc.

The contract need not have been in writing originally, provided that before any action is brought any note or memorandum of the previous verbal agreement is made and signed by the party against whom such action is brought.

It is not necessary that the whole of the agreement should be contained in one writing. It may be necessary to read through a long correspondence to ascertain what the agreement really is. But if an agreement is contained in more than one writing, the several writings must show of themselves without any outside evidence that they are connected and refer to the same matter. If two documents were said to constitute an agreement, but it were necessary to give *viva voce* evidence to show that they referred to the same matter, then

the agreement would be proved partly by writing and partly by spoken words. The agreement, therefore, could not be said to be one wholly in writing. Thus, if an agreement is said to be contained in two letters, one making a proposal and the other containing an acceptance, the letters must show of themselves that the one is an answer to the other; otherwise it might be possible for a person to put forward the first-mentioned letter together with another letter accepting some other proposal not specified in such letter, and fraudulently to represent the two letters as forming an agreement. A letter and the envelope containing it constitute one document.

Contracts by Executors.—The first of the five contracts mentioned above is a promise by the executor or administrator of a deceased person to pay out of his own pocket damages for which the estate of the deceased man is liable. Such a promise would be void in any case if there were no valuable consideration for it. If there were such consideration, it would be only binding provided the agreement was in writing and signed by the executor or administrator or his agent.

Contract of Guarantee.—The second of the contracts is a promise by one person "to answer for the debt, default, or miscarriages of another person." This includes the very important contract of guarantee. To constitute a guarantee there must necessarily be three parties—a creditor, a debtor, and a third person who promises the creditor that he will pay the debt of the debtor if the debtor does not himself pay it. The third person is a guarantor, or surety, and if he makes such promise he is said to guarantee the payment of the debt. Then, by the provisions of the Act, such promise is not enforceable against him unless he make the promise in writing and sign it.

There can be no guarantee unless the principal debtor continues primarily liable to pay the debt, and unless the liability of the surety is conditional on the failure of the debtor to perform his duty. If a person by agreement with a creditor takes a debtor's debt entirely upon himself and promises to dis-

charge it, he is not a surety but a new debtor, substituted for the original debtor, who is discharged. If I introduce a friend to a shopkeeper, and say, "Supply this gentleman with goods, and I will pay you if he does not," I am a surety, or, in other words, I guarantee my friend's debt; therefore my promise is of no value to the shopkeeper unless it is in writing signed by me. But if I say, "Supply this gentleman with goods and I will pay for them," my friend never becomes a debtor to the shopkeeper; I alone am liable for the price of the goods supplied, and no writing whatever is necessary in order that my promise should be binding upon me.

The same principle applies to promises to answer for the past, present, or future debts of another; and also to promises to answer for any obligation which another may incur by reason of any wrongful act he may do.

The "promise," however, means only a promise made to the creditor or person to whom the obligation is or may be incurred. A promise made to a debtor to pay his debt may be binding without writing.

A guarantee (like any other promise) is not binding unless there be consideration for the promise to answer for the debt of another. This consideration is usually the credit given to the debtor by the creditor, or else the forbearance by the creditor to press the debtor or take legal proceedings against him to enforce the debt. But although there must be consideration for a promise given by way of guarantee, and although the promise must be made in writing and signed by the surety, the consideration need not appear in the writing. This is an exception to the general rule that the writing must contain all the material terms of the agreement.

The position of a surety is often a thankless one, and the law jealously looks after his interests in many ways. Thus, although he may sign a contract of guarantee he never becomes liable if the creditor is a party to any deception used to induce him to become surety, or if the creditor is a party to the con-

cealment from him of any material fact which would influence him in deciding whether to become surety or would show the risk to be greater than he supposes. Also, if he signs a guarantee on the understanding that another person is to sign as co-surety and that other person refuses to sign, he does not become liable.

Again, a surety is discharged from liability if the creditor and debtor in any way alter the terms of the contract between them with reference to which the guarantee has been given, unless the surety consents to such alteration. For example, A lends B £100 at 5 per cent. interest and C guarantees the debt of B. Subsequently A lends B another £50 behind the back of C on the condition that B shall pay 6 per cent. on the whole debt of £150; C the surety is discharged from all liability by this alteration in the terms of the contract between A and B.

If the creditor makes any binding agreement to give the debtor time, the surety is discharged; but he is not discharged merely because the creditor refrains from taking proceedings to compel the debtor to pay. He may, however, call on the debtor to pay so as to relieve him of his liability, or himself pay the debt, and then sue the debtor in the creditor's name. The surety is also discharged if the creditor compounds with the debtor, unless the creditor expressly reserves his rights against the surety. The fact that the creditor has accepted from the debtor some new and additional security for the debt is of course an advantage to the surety, and does not affect his liability.

When a guarantee is given to a firm the surety is discharged by any change in the persons composing the firm, unless otherwise agreed when he makes the contract. Thus if D guarantee an advance by a private bank to E and subsequently there is a change in the composition of the firm owning the bank, D is no longer bound by his guarantee unless the contract he entered into provides for the contingency. If the bank is a company, this difficulty does not arise.

It is often an important question whether a guarantee is limited to one transaction, or whether it is meant to cover a series of transactions and debts contracted from time to time. In the latter case it is called a " continuing " guarantee. For example, A guarantees the account of B at a bank to the extent of an overdraft of £500. Here the intention usually is that B pays in and draws out from time to time in the ordinary course of his business, and that at any time he may overdraw his account to an amount not exceeding £500. So that at one time there may be a balance in his favour and at another against him, but the guarantee protects the bank to the extent it was given as long as it continues. Unless prohibited by the terms of his contract, the surety may in such a case at any time by notice to the bank terminate the guarantee, and so limit his liability to the bank to the amount of B's debt at the date of such notice. On the other hand, if only one specific debt is guaranteed, the liability of the surety ceases when that debt has been paid, and is not renewed if a fresh debt is incurred for the same amount. Whether a guarantee is " continuing " or not is, in each case, a question to be decided by the circumstances.

When two or more persons become jointly liable as co-sureties, the release of any one of them by the creditor releases all.

If there be several co-sureties and one pays the debt, he is entitled to contribution from the others, so that all, or all that are solvent, shall bear the burden equally. Thus if X, Y and Z were co-sureties and X paid the whole debt, he would be entitled to one-third of the debt from Y and one-third from Z. But if Z were insolvent and unable to pay X would be entitled to recover one-half of the debt from Y.

If the surety has been compelled to pay the debt he takes over all rights and securities of the creditor as against the debtor. If the creditor has any other security for the debt in addition to the guarantee, the surety who pays the debt has a

right to the benefit of that security. For example, if A lend B £100 which is guaranteed by C, and if B also hand over a diamond ring to A as additional security, C, if he pay the £100 to A, is entitled to have the ring handed to him to hold until B repay him.

It is often very difficult to say whether a contract is a contract of guarantee or of indemnity. The question may be of importance, for writing is necessary to bind the guarantor, but is not necessary to bind one who agrees to indemnify another. An indemnity is a promise to save a person harmless from loss in a transaction into which he enters at the request of the person promising. The result of such an agreement may be that the person promising has to pay the debt of another, but that is not the object of the agreement. For example, a wine merchant verbally agreed with D to pay him a commission on the amount received from customers introduced by D, and D promised to pay to the wine merchant half the loss in case any customer introduced by him made default in payment. This promise by D may, incidentally, result in D having to pay the debt of another; it is not, however, a guarantee, but an indemnity, and is binding on D, although not in writing. A surety, as a rule, has no interest in the liability he guarantees; one who gives an indemnity, however, has an interest in the transaction undertaken by the person who receives his promise.

Closely resembling guarantees are representations made by one person in order to induce another person to give credit to a third person. Such a representation does not generally constitute any contract, but if it is made falsely and fraudulently it is a tort for which damages may be recovered by the person to whom the representation is made, if he act upon the representation to his loss. Such a representation, however, gives no right of action unless it is made in writing signed by the person who makes it.[1]

[1] 9 Geo. IV. c. 14, commonly called Lord Tenterden's Act. Signature by the agent is not in this case sufficient.

Contracts in consideration of Marriage.—The third of the agreements which are not enforceable unless in writing is an agreement made upon consideration of marriage. Where A and B promise to marry one another, the consideration for A's promise to marry B is B's promise to marry A. Such a contract is binding on the parties, and an action for the breach of the promise may be brought if it is broken, although there is no written agreement. The contract referred to, which is not binding unless in writing, is a contract to do something else in consideration of marriage, *e.g.* an agreement by A to settle a sum of money upon B in consideration of B's promise to marry A.

Contracts relating to Land.—The fourth of these contracts is any contract for the sale of land, or by which any interest in land is given. "Land" in law includes not only the surface of the earth, but also everything attached to the surface and above the surface, as houses or trees, and everything below the surface, as mines, clay, or gravel.

A contract to buy or sell land is not binding upon any person who has not signed a written agreement or memorandum of agreement to so buy or sell: so a contract to let a house, as it is a contract to give an interest in land, requires writing. This, however, only refers to a contract to let a house in the future: a house may be actually let for any term not exceeding three years without any writing, where possession under the agreement is given. Again, a contract to sell trees actually growing is a contract for an interest in land, as the trees are part of the land; but if the trees have been, or are immediately to be felled, a contract concerning them is a contract concerning goods, not land, as by the act of severance the trees cease to be land.

Contracts not to be performed within a Year.—The fifth and last of these contracts under Section 4 of the Statute of Frauds is any agreement not to be performed within a year of the making thereof. This refers to contracts which from their

nature are incapable of being entirely carried out by either party within a year. Unless such a contract is in writing and signed by a person it is not enforceable against that person. Thus, if I agree to employ a clerk for a year from this day week and to pay him a quarterly salary, it is clear that neither he nor I can completely perform what we have undertaken to do within a year of the time of making the agreement. This agreement, therefore, is only binding against either of us provided it is in writing and signed by that one. But if the agreement was for a year *from to-day* no writing would be necessary, as the agreement would be completely performed by both parties within a year.

Writing is not necessary where the contract is not in fact completed within a year, provided that it was capable of being performed within a year. Thus, if a debt be due, and in consideration of further credit the debtor promise to pay interest on the debt till it is paid, here the time is indefinite, for the debt may be paid within a month, or it may not be paid for years. Such an agreement is binding without writing.

Also, where the contract is to be completely performed by a party within a year, though the other party is not to perform his part within a year—as when money is lent now, to be repaid by four half-yearly instalments—no writing is required.

Contracts for Sale of Goods.—These are dealt with under Sale of Goods, *post*, p. 105.

ACCEPTANCE OF OFFER

There can be no agreement between parties unless the acceptance corresponds exactly in all essential matters with the offer or proposal. Where the answer to the offer is in terms which introduce any condition or new matter not included in the offer there is no acceptance. Thus, where A writes offering to sell 20 quarters of wheat to B at 30*s*. a quarter, and B writes back, "I accept your offer provided you

pay the carriage of the wheat to my warehouse," there is no acceptance; for B is introducing a new element, *i.e.* payment of carriage, and there is no proposal on this subject contained in A's offer. Again, when Jordan wrote to Norton offering to buy his horse for 20 guineas if Norton would warrant the horse "sound and quiet in harness," and Norton wrote back that the horse was "sound and quiet in double harness," there was no agreement; for a horse may be perfectly quiet in double harness and quite the reverse in single harness.[1]

Either offer or acceptance may be expressed by conduct without any words either written or spoken. Thus, a tramcar running along a road is an offer by the tramway company to carry you; and if you step into the car you have accepted the offer and agreed to pay the usual fare. Again, an automatic machine for selling matches makes an offer to sell a box to anyone who will put a penny in the slot; this offer is probably in words inscribed on the machine, but the offer can be accepted only by conduct, *i.e.* by putting a penny into the slot.

An offer can only be accepted by the person to whom it is made; but an offer may be made to anyone who will accept it by doing a certain act. In such a case anyone who does the act accepts the offer, and the party offering will in general be bound. Thus, if a person loses his dog and advertises a reward of £5 to be given to anyone who brings the dog back, he has made an offer; and if you find the dog and take it back you have accepted the offer, there is a binding contract, and the owner of the dog must pay you the £5. Again, the Carbolic Smoke Ball Company advertised in the newspapers a certain medical preparation as a preventative of influenza, and offered to pay £100 to any one who contracted the complaint after having used it according to the directions. Mrs. Carlill bought it and used it as directed, but caught influenza, and on her demand for £100 being refused she brought an

[1] *Jordan* v. *Norton*, 4 M. and W. 155.

action against the company. She was held to be entitled to succeed, as by following their directions she had accepted the offer of the company, the using of the preparation at their request was consideration for the company's promise, and all the essentials of a valid contract were present.[1]

An offer can be withdrawn at any time before it is accepted; and acceptance after such withdrawal is useless. A promise to keep an offer open is not binding unless there be consideration for such promise. Thus, when Oxley offered to sell a quantity of tobacco to Cooke, Cooke asked him to allow him until four o'clock in the afternoon to make up his mind. Before four o'clock, however, Oxley determined not to sell at the price he had named. It was held that he had a perfect right to withdraw his offer, and that his promise to keep the offer open was not binding, as there was no consideration for it.[2] But if any consideration is given to induce the offerer to keep his offer open, clearly the promise will be binding. Also, where there is an offer, and a statement that the offer will be kept open for a certain time, the offer is understood as being made during that time; and if the party making the offer wishes to withdraw it, he must notify his intention to the other party before it has been accepted. If the other party accepts the offer before the withdrawal is communicated to him, there is a binding contract. This communication, however, need not be made expressly to the other party; it is quite sufficient if the change of mind of the offerer is brought clearly to his notice in any manner.

If a person make an offer by post, he is understood to be making the offer all the time the letter is on its way. And if the other party accept the offer by posting a letter of acceptance within the time mentioned in the offerer's letter, or (if there is no such time mentioned) within a reasonable time, and before receiving any notice of withdrawal, the acceptance is complete

[1] *Carlill* v. *Carbolic Smoke Ball Co.* (1893), 1 Q. B. 256.
[2] *Cooke* v. *Oxley*, 3 T. R. 653.

and the offer is binding. A letter written by the offerer withdrawing the offer has no effect unless it arrives before a letter accepting the offer is posted. As soon as the letter accepting the offer is posted the acceptance is complete, even though the letter may never arrive. An offer by letter may, however, be withdrawn by telegraph, provided the telegram arrives before a letter of acceptance is posted. If the delivery of a letter making an offer is delayed by the offerer's fault, an acceptance posted within a reasonable time of the receipt of the offer and before any notification of withdrawal is in time. Thus, Lindsell wrote to Adams at Bromsgrove offering to sell Adams a quantity of wool, and asking for an answer in course of post; but by mistake he addressed the letter to *Leicestershire* instead of *Worcestershire*. The wrong address caused a delay in the delivery of the letter; but on receiving the letter Adams accepted the offer by return of post. Meanwhile, Lindsell, not getting an answer by the post he expected, sold the wool to another buyer, and was unable to carry out his offer. It was held that he was bound by his contract and liable to pay damages, as Adams had accepted by the first post after receiving the offer, and the delay was entirely due to the mistake of Lindsell himself.[1] In the absence of any time being mentioned for acceptance, a letter accepting an offer must (as has been said) be posted within a reasonable time. What is a reasonable time depends on the circumstances of each case, and no hard-and-fast rules can be laid down. As soon as a reasonable time has elapsed and no answer has been received, the offerer is entitled to assume that his offer has been rejected.

ILLEGAL AGREEMENTS

Where the object of any agreement is illegal the agreement is void; or, in other words, a promise is not binding if the consideration for the promise or the promise itself is illegal.

[1] *Adams* v. *Lindsell*, 1 B. and A. 681.

An agreement may be illegal (and therefore void) in three distinct ways: (1) It may be contrary to positive law; (2) it may be contrary to morality; or (3) it may be contrary to public policy.

Agreements contrary to Positive Law.—It is quite obvious that no system of law could recognize as binding an agreement to do any act forbidden by law, *e.g.* to commit a crime; therefore every such agreement is void. Also, an agreement between two persons to defraud a third person is void even though the contemplated fraud does not amount to a crime. Thus, where an insolvent person arranges with his creditors to pay them a composition in discharge of his debts, but agrees with one creditor behind the backs of the others to pay him an additional sum in order to induce him to consent to the arrangement, this agreement is void as being intended to defraud the rest of the creditors.

In some cases a contract is declared to be void by Act of Parliament. For example, an agreement between a master and a servant that in case the servant is injured by an accident arising out of and in the course of his employment no compensation shall be paid to him is void by the provisions of the Workmen's Compensation Act, 1925.

Again, although a bet or a wager is not an unlawful act, and a person may make a bet and receive his winnings or pay his losings without incurring any penalty, money won by a bet cannot be recovered by any process of law; for the agreement is declared by statute to be null and void. Further, if a person makes a bet and loses, and requests another to pay his loss for him, the person so paying cannot recover his money from the person first mentioned. Thus, if A employ a bookmaker to make a bet for him as his agent, giving him authority to receive winnings or to pay losses, and if the bookmaker make a bet and lose and pay, he cannot recover from A what he has paid, neither can the bookmaker recover from A any commission or reward which A may have promised him for making the bet,

whether the bet be won or lost; but if the bet be won and the bookmaker receive the winnings on A's behalf, A can recover the money from the bookmaker.

Agreements contrary to Morality.—Any agreement is void which is so contrary to morals and good manners that it would be a public scandal for a court of justice to interfere to enforce it, although no crime or matter positively forbidden is involved. Thus, an agreement with a photographer to print indecent pictures, or with a woman for illicit cohabitation is void.

Agreements contrary to Public Policy.—An agreement may not be contrary to any positive law, nor contrary to morality, but still it may be of such a nature that the general welfare of the State and the interests of the public are impugned by it. Such agreements are void. For example, trading with a citizen of a country with which this country is at war is illegal.

An agreement which interferes with the course of justice, as a promise to pay an intended witness money to absent himself from a trial, is void. So an agreement by which a person is to provide funds to enable another to prosecute legal proceedings in consideration of sharing in any money or property recovered in the action is void; for the promotion of litigation by persons not really interested is considered a public evil.

Again, an agreement never to marry is void, for it is to the public interest that persons should marry and keep up the supply of citizens. But an agreement not to marry a certain individual may be perfectly good. All these are examples of agreements which are for one reason or another void as being contrary to public policy.

One of the most important of such agreements is an agreement in restraint of trade. This is an agreement by which a person undertakes not to exercise some specified trade, business, calling, or profession. It is clear that such an agreement, if binding, might have the effect of preventing a man from earning his living by the only means by which he is able to earn it, and so might bring him to the state of a pauper sup-

ported at the public expense. The law has always looked with great disfavour upon such agreements; and an agreement in general restraint of trade, *i.e.* one by which anyone undertakes never at any time or place to carry on a particular trade, is void. If, however, no agreement in restraint of trade were allowed to be binding, it is clear that it would be almost impossible to sell the good-will of a business, and that in other cases great injustice might be done. Therefore a partial restraint, which is not greater than is reasonably necessary to protect the interests of the party in whose favour the agreement in restraint is made and is reasonable in the interests of the public, is good, provided that in all cases, whether the agreement is by deed or otherwise, it is made for valuable consideration.

Thus, Reynolds carried on business as a baker in Holborn, and sold his business to Mitchell, undertaking not to carry on the business of a baker in the parish of St. Andrew, Holborn, for five years under a penalty of £50. In a short time, however, Reynolds started in business again as a baker in that parish, and Mitchell brought an action against him for £50, and won his action.[1] Here the restraint against carrying on the business for five years within the parish was considered only what was reasonably necessary to enable the buyer of the good-will of the business to reap the full advantage of his purchase. But if Reynolds had agreed not to carry on business as a baker for five years within 50 miles of Holborn, such agreement would probably have been held to be void, as being greater than necessary to protect the interests of the buyer; for if he had opened a baker's shop in Croydon he could hardly have attracted his old customers at such a distance or have injured the trade of Mitchell in Holborn.

It is a very common arrangement for the owner of a business to bind a manager or assistant in the business not to carry on a similar business within a certain distance for a certain time

[1] *Mitchell* v. *Reynolds*, 1 P. Wms. 181 and S. L. C.

after leaving his employment. The courts will examine such an arrangement even more strictly than an agreement for the sale of a business in order to be sure that the assistant is not unduly restrained from earning his livelihood. If, however, such an arrangement is necessary in order to protect the owner of the business from the danger of having his customers enticed away from him by one who has used his position to ingratiate himself with his employer's customers and to learn their requirements, and, if the agreed restraint is not greater than is reasonably necessary to protect the interests of the employer, such agreement is valid. What is a reasonable restraint depends on the facts of each particular case, and the reasonableness of the restraint varies with the nature of the trade or business. Thus, 50 miles might be an unreasonable restraint in the case of a baker, but might be no more than reasonable in the case of an auctioneer. It was thought at one time that no restraint could be reasonable which was unlimited either as to time or space. This, however, has been shown to be unsound; for when Nordenfeldt sold his business as a manufacturer of machine guns to a company, and covenanted not to carry on a similar business for a certain time anywhere in the world, it was held that his covenant was binding upon him; for in such a peculiar business, the customers for such guns being nations, not individuals, the restraint was not greater than was necessary to protect the interests of the company.[1]

An agreement in restraint of trade, even though made by deed, is void unless made for valuable consideration.

Agreement with Money-lenders.—An agreement to lend money at interest is not illegal or void, but it was found necessary to pass various Acts in order to curtail the power of usurers, as the result of which a most unusual power has been given to the courts, namely, that of setting aside the contract where it appears that the interest charged is excessive

[1] *Maxim-Nordenfeldt Co.* v. *Nordenfeldt* (1894), A. C. 535.

and that the transaction is harsh and unconscionable, and making a new contract for the parties, allowing the money-lender such sum as appears reasonable. The Acts do not affect genuine businesses, in the course of which money is lent, such as banking, pawnbroking, or insurance businesses, but only affect persons whose business is that of money-lending. A money-lender must register, take out an annual licence, and only carry on business at his registered address and in his registered name. Any agreement made by him in disregard of any of these provisions cannot be enforced by him.

IMPOSSIBLE AGREEMENTS

If a party agrees to do something which is by its nature impossible in itself, or which is impossible in law, the agreement is void from the beginning. Thus, a person who agrees to make a machine with perpetual motion is agreeing to do something which is impossible in itself. And a person who agrees to sell Windsor Castle is agreeing to do something which is impossible in law, for it cannot be private property. In either case the agreement is void.

But an agreement is not void which is impossible only by reason of the existence of particular circumstances, and not by reason of anything in its own nature. Thus, an agreement to sail to a certain island and there load a full cargo of certain produce of the island is not impossible in its nature; but if it happens that when the ship arrives at the island there is not sufficient of the goods to make a full cargo, the agreement is impossible by the circumstances. This agreement is not void.

There are, however, three cases in which an agreement not impossible by reason of anything in its own nature may become void so as to discharge the parties from all liability for non-fulfilment.

1. *Change in the law.* A contract may be good when made, but may cease to be binding if an Act be passed which makes

it impossible in law for a party to perform his obligation. For example, the owner of a house gave a lease of the house and covenanted with the tenant that no building should be erected upon a piece of adjoining land which also belonged to him. An Act was passed which gave a railway company power to take this piece of land compulsorily and build a railway station upon it. This Act made it impossible for the landlord to observe his covenant and it ceased to be binding upon him.[1]

2. *Death or incapacity.* When the performance of an agreement depends on the life or continued capacity of a party who undertakes personal service, the agreement becomes void in case the party die or become incapable. For example, if an artist agree to paint a picture, and die or become permanently blind before he has time to carry out his agreement, the agreement is void, for the contract was based on the common assumption that the artist would continue capable of carrying out his agreement.

3. *Destruction of basis of contract.* Where performance of a contract depends upon the continued existence of a specific thing, the destruction of that thing without fault of either party excuses performance. Thus, where Caldwell agreed to let a music-hall to Taylor for certain days for the purpose of Taylor giving public entertainments, and before the first of the days arrived the hall was burnt down so that the entertainments could not be given, it was held that the agreement was void, and Caldwell was not liable to pay Taylor damages for breach of contract.[2]

In such a case it is considered to be an implied term of the agreement that it is not binding if performance become impossible before the agreement is broken by something which occurs without any default of the party whose performance has become impossible.

[1] *Bailey* v. *de Crespigny*, L. R. 4, Q. B. 180.
[2] *Taylor* v. *Caldwell*, 32 L. J. Q B 164.

But where a person has taken a house on lease, and the house is accidentally burnt down, he must go on paying rent as he had covenanted to do, although he is paying only for a burnt-out site, unless there is anything in the lease to relieve him from this obligation.

If the performance of a promise become impossible by the act or default of the person himself who makes the promise, he is not excused from liability. On the other hand, if performance become impossible by the act or default of the other party, the person who makes the promise is excused from performance, and has a right to recover damages from the other party for any loss he may suffer from that party's default.

Performance is similarly excused where it becomes impossible by reason of the non-existence of a state of things assumed by both parties as the foundation of the contract. Thus, where a room was hired for the sole purpose of viewing a procession, and the procession was cancelled, both parties were held discharged from further performance of the contract, and the claim for unpaid balance of rent failed.[1] And if circumstances occur outside the control of the parties which make performance impossible, and which are of such a nature that the parties must be assumed to have contracted on the footing that the object of the contract would be frustrated if such circumstances were to occur, the contract is void. Many examples of this principle were supplied during the Great War, when contracts made before the war became impossible of performance because of the war, and such contracts would certainly never have been made if the parties had contemplated war.

AGREEMENTS WHERE CONSENT NOT REAL

As has been said previously, there can be no agreement without consent. Unless the consent is real, full, and free

[1] *Krell* v. *Henry*, 1903, 2 K. B. 740.

there can be no true agreement. If a man is compelled by force or induced by threats of violence to make a promise or to sign an agreement it is clear that his consent is not real; therefore his agreement is not binding upon him. The same rule applies where a person has been induced to enter into an agreement by undue influence, *i.e.* where one party has acquired such power over the other as to prevent the free exercise of his will Certain confidential relationships, *e.g.* solicitor and client, guardian and ward, religious superior, etc., raise a presumption of undue influence. Again, he may make an agreement in ignorance of some fact the knowledge of which would have prevented him making the agreement. If this ignorance was not in any way caused by the act of the other party to the agreement, he is said to have acted under a mistake. If the ignorance was brought about by the act of the other party, then there has been misrepresentation by that party. If he acted innocently, there has been innocent misrepresentation or misrepresentation simply; but if he acted with a wrong intention, there has been fraudulent misrepresentation or fraud.

Mistake.—As a general rule, a party to a contract who makes his contract under a mistake is not excused from performing his contract by reason of the mistake; and the mistake has no legal effect whatever upon the validity of the contract. A person who deals with another and does nothing to mislead him is entitled to assume that the other means what he says, acts with ordinary care and intends the natural consequences of his acts. Thus, a person who goes to an auction and by his own carelessness, without any fault on the part of the auctioneer, bids for one lot intending to bid for a different lot is bound by his agreement to buy the lot he does not want; and if he refuses to carry out his agreement he may have to pay damages for breach of contract.

Ignorance of law is no excuse for any act; and so money paid in mistake of law cannot be recovered. But if money be

paid under a mistake of fact it can be recovered; for it is paid without consideration and without any intention to make a gift. Thus, if I pay money to A under the mistake that he is B, on discovering my mistake I have the right to recover the money from A. Again, if having paid a tradesman a debt I, forgetting the fact, by mistake pay him a second time, I am entitled to get my money back from the tradesman.

There are some other mistakes which are of such a nature that they show that the parties never really gave their consent and never were at one in their agreement. In three of such cases the mistake makes the agreement void—

(1) Where a person makes an agreement under a mistake as to the nature of the transaction, and the mistake is neither induced by fraud nor due to his own negligence, the agreement is void because of the mistake. For example, where a man signed a bill of exchange, believing it to be a guarantee only, it was held he was not bound by his signature.[1] But this kind of mistake can seldom occur in practice except in the case of illiterate persons, and in their case, if any advantage is taken of their ignorance, the agreement is void on the ground of fraud, rather than on the ground of mistake. A man as a rule will not be allowed to say that he did not understand the nature of an agreement into which he has entered with his eyes open. If he choose to sign a document without reading it, and no deception is used to induce him to sign, he must in general stand by the words of his contract.

(2) When a person makes a mistake as to the identity of the other party to an agreement, and it is material for him to know who the other is, the agreement is void. In very many cases it is not material to know who the other party to a contract is. For example, if you buy goods for cash from A, believing him to be B, it probably makes no difference at all who the seller is, provided you have got what you required. In such a case your mistake has no effect whatever upon your

[1] *Foster* v. *Mackinnon*, L. R. 4, C. P. 704.

agreement. But if I agree to employ J. S. as my clerk, believing him to be T. S., whose character I have investigated, my agreement with J. S. is void; for the identity of the other party is to me the most important part of the contract.

(3) Where there is a mutual mistake as to the identity or the existence of the subject matter of the agreement, the agreement is void. Thus, if A agree to sell his horse Cæsar to B, and B, mistaking the names of two horses, thinks he is buying one, while A intends to sell the other, the agreement is void. Again, Raffles agreed to sell to Wichelhaus a quantity of cotton to arrive by the ship *Peerless* from Bombay. In fact, there were two ships called *Peerless* sailing from Bombay, but neither of them knew this. Wichelhaus intended to buy the cotton to arrive by one of these ships which sailed in October, Raffles intended to sell the cotton to arrive in the other which sailed in December. It was held that the agreement was void.[1] In each of these cases there was a mutual mistake or a misunderstanding as to the identity of the subject matter of the agreement. Again, where A agrees to buy a certain horse from B, and the horse is in fact dead at the time of making the agreement, though neither A nor B is aware of the fact, the agreement is void; for there is a mutual mistake as to the existence of the subject matter of the agreement.

Misrepresentation.—The consent of one party to an agreement is sometimes obtained by means of a false statement made by the other party in order to obtain that consent. If that false statement was made in the honest belief that it was true, there is said to have been an innocent misrepresentation. The party misled may then have the contract rescinded, provided that the representation concerned some material existing fact (*i.e.*, not a mere matter of opinion, or statement of value, or prediction as to the future), that the contract has not yet been completed, that the parties can be restored to their former position, and that there has been no undue delay

[1] *Raffles* v. *Wichelhaus*, 33 L. J., Ex. 160.

in seeking to set aside the contract. The contract remains binding, however, until it is set aside. If the false statement was made knowingly it may amount to fraud.

Fraud.—Fraud consists in making a false statement, either knowing it to be false, or recklessly without any knowledge whether it be true or false, with the intention of inducing some person or class of persons to act upon such statement. There can be no fraud in law unless there be dishonest intention, or moral fraud; and honest belief in the truth of a statement, however unfounded that belief may be, is a good defence to a charge of fraud Fraud is a wrong in itself, quite apart from contract; so that if a person make a false statement, knowing it to be false, in order to induce another to act upon it, and if that other acts upon it and is injured by so acting, he has a right to damages for such injury against the person making the statement. Thus, if A write to B representing that C is a perfectly solvent person in order to induce B to give C credit, when in fact he knows that C is insolvent, A is guilty of fraud, and if B, believing this false statement, give C credit and suffer loss in consequence, he has a right to recover damages from A for his loss due to A's fraud, although there was no contract between A and B.

When fraud is used in order to induce a person to make a contract, that person is not bound by the contract; for it is manifest that consent procured by deceit is not real consent. In such a case the contract is not *void*, for the person deceived may, if he choose, hold the other party to his agreement, and also recover damages from him for any loss he may have suffered from the fraud The contract is, however, *voidable*, that is, the person deceived has the right to elect whether the contract shall be void or not; but the fraudulent party has no choice in the matter. When, after having acquired full knowledge of the fraud, the person misled does any act clearly treating the contract as still binding, he cannot afterwards repudiate the contract; but he continues to be entitled to

compensation for loss incurred by the fraud. If he repudiate the contract on discovering the fraud, or after discovering it does not do any act recognizing the contract as still binding, then the fact that he was induced to contract by fraud will be a good defence to any action brought against him for breach of contract.

To constitute fraud a representation must as a rule be a false statement as to a matter of existing fact. Therefore a statement as to future intention will not usually be fraud; for the existence of intention is difficult to prove, and a change of intention at a time subsequent to the representation does not make the representation false. But the existence of intention may be a matter of fact; therefore if a person induce another to make a contract by a statement of future intention, and it can be shown that in fact the intention was a different one, the statement is fraudulent. Thus, the directors of a company issued a prospectus inviting the public to buy debentures in the company, and representing that it was intended to use the money for the purpose of enlarging the business premises and buying additional plant; in fact, they had determined to use the money which should be subscribed in paying off debts of the company. It was held that this false representation of intention was fraud.

Fraud may be committed in an infinite number of ways—as by writing, by spoken words, or merely by conduct—in fact, by any means by which a false impression can be conveyed. But, although a party to a contract must not in making the agreement make any false statement, or tell anything but the truth, he is in general not bound to disclose all the material facts which he knows, or to tell the whole truth. In other words, mere silence or non-disclosure of material facts does not in most cases amount to fraud. There are, however, certain contracts the parties to which are presumed to deal with one another on terms of mutual confidence, and in such contracts the mere non-disclosure of material facts may amount to fraud.

Thus, in the contract of suretyship, where the creditor and the debtor conceal from the surety any fact which would show that the surety was undertaking a greater risk than he knew of, the surety is not bound by his contract. Again, in the contract of insurance the person insured is bound to reveal everything within his knowledge and which he has reason to believe is not within the knowledge of the other party, which goes to increase the risk. Concealment of any material fact makes any contract of insurance (life, fire, marine, accident, or other) voidable at the option of the insurer.

Again, where a party to a contract has made a statement which at the time of making it he believed to be true, but afterwards he discovers that the statement was false, he is bound to disclose to the other party the fact that the statement was false. If he fail to make such disclosure and allow the other party to act upon the truth of the statements, he is guilty of fraud.

An untrue statement made carelessly, in such circumstances that if reasonable care had been taken the person making it must have known it to be untrue, is *prima facie* evidence of fraud. But it does not necessarily amount to fraud; for if the person making the statement honestly believed it to be true, however unfounded his belief was, he is not guilty of fraud. He who alleges fraud must as a rule prove the fraud. In the case, however, of the directors, promoters, or officers of a company there are exceptions to these rules, as will be seen later.[1]

In trade it is often difficult to draw the line between puffing and actual fraud; but a business man should not readily be deceived by the common tricks of the market, nor allege fraud unless he really believed false statements made to him, and acted upon those statements to his loss.

[1] See *post*, p. 78.

PROOF AND INTERPRETATION

A contract not made in writing is often difficult of proof. The difficulty is to prove what was the real intention of the parties. This can, as a rule, only be proved by verbal evidence, and obviously there is much room for difference between parties as to the terms of the contract. One cause of this is the uncertainty of memory; another is the possibility of dishonesty; and a third is the different senses in which parties may understand the effect of words or of a conversation. Much light is often thrown on the question by the conduct of the parties in regard to the matter of the contract; and their real intention can in many cases only be ascertained from their conduct.

Contracts in Writing.—Where the contract is in writing, however, such difficulties disappear. The contents of the writing are proved simply by production, and it is for the court to say what the writing means. No evidence may be given that the intention of the parties was anything different from what is expressed in the writing. No evidence may be given as to anything which was said or done before or at the time the writing was made for the purpose of altering or contradicting any of its terms Thus, when there was a contract in writing by which A agreed to sell to B a certain quantity of corn at so much a quarter, to be delivered within three months, A was not allowed in an action by B for not delivering the corn to make a statement to the effect that when the writing was signed it was agreed between them that the corn should only be delivered in case a certain ship arrived with corn on board. If he had been allowed to give such evidence, he would have been allowed to entirely alter the effect of the contract, and at once to turn an unconditional into a conditional contract.

But when two persons have made a contract, they may *afterwards* agree to vary or alter some of the terms of the contract. This is really making a new contract. If, therefore,

the contract is one which is not binding unless it is in writing, it is clear that such variation and alteration can only be made in writing. But if the contract, although not obliged by law to be in writing, was in fact in writing, the parties may after the writing is signed agree verbally to vary or alter it.

Although no verbal evidence may be given to alter or contradict the terms of a written contract, such evidence may sometimes be given to explain it. The judge alone decides the meaning of ordinary English words and sentences. Sometimes, however, words are used in a contract not in the ordinary sense, but in the sense peculiar to some business or locality. In such a case evidence may be given as to the peculiar meaning attached by the parties to such words. For example, evidence is admissible that in a certain business a "dozen" is understood to mean thirteen; that in the corn trade "fine" barley has a peculiar meaning, and is not the same as "good" barley, etc. On the same principle, where a contract is in a foreign language, or where foreign words are used in a contract in English, evidence is admissible with the object of translating the contract or the words into English. Evidence may also be given to show that a contract was only to come into effect on the happening of a certain event, or that the contracting party was only an agent, and evidence may be given of a collateral verbal agreement which does not contradict the written document. Thus, if a lease describes the rent of a house as £50, no evidence may be given to show that in certain events the rent was to be raised or lowered, but a verbal agreement by either party to do repairs to the house may be proved

Ambiguities.—An "ambiguity" is something in a contract the meaning of which is doubtful. A "patent" ambiguity occurs when the fact that there is an ambiguity is clear to any one who reads the writing and who has no knowledge of the circumstances in which the writing was made. For example, a written agreement is made to sell goods for £

No evidence is admissible to fill up this blank, or to explain any other patent ambiguity. However, the whole document must be considered by the judge (or the whole series of documents if there are a number of connected documents relating to the matter), and if the judge can find in the writing an explanation of the ambiguity it will be his duty to interpret the contract. Thus, if an agreement is made between A and B that B shall serve A for a month at so much a day, there is a patent ambiguity, for it is doubtful whether B's period of service is for a lunar or a calendar month. The judge will not hear evidence from the parties giving contradictory accounts as to what the intention of each was as to the meaning of "month"; it will be for him to say what the word means after perusing the whole document.

A "latent" ambiguity occurs when the fact that there is an ambiguity does not appear to any one reading the document unless he is acquainted with the circumstances in which it was made. Thus, an agreement between two persons to submit a difference as to the value of certain goods "to the decision of Mr. James Green, valuer, of Birmingham," contains no ambiguity on the face of the agreement, and its meaning is not doubtful to a stranger who reads the document without knowledge of the circumstances. But if there are two gentlemen each named James Green carrying on business as valuers in Birmingham there is an ambiguity in the agreement, the existence of which is clear to a person who knows the fact. This is a latent ambiguity, and evidence is always admissible to explain a latent ambiguity. Therefore evidence is admissible to explain which James Green the parties had in their minds when they made the agreement.

In interpreting a contract contained in a document or in a series of documents, the whole writing must be considered. One sentence or term must not be picked out and considered by itself apart from the rest. Every part must be read in the light of the rest, and if possible a meaning must be given to

every term. The contract must be interpreted reasonably and liberally, and no strained or far-fetched meaning unlikely to have been in the contemplation of the parties when the contract was made should be given to any term in it.

STAMPS AND RECEIPTS

Stamps.—Many written documents, and almost all deeds, are required by law to be stamped. This stamping is merely a mode of taxation, and the absence of a stamp does not as a rule invalidate the document. But an unstamped document cannot be used in evidence in a court of justice, nor can other evidence be given as to its contents. The defect, however, may usually be remedied by paying a penalty and getting the document stamped.

The stamp must be affixed, as a rule, either before or within a short time of the execution of the document. A bill of exchange, however (other than a cheque), a bill of lading, and a policy of marine insurance if made in the United Kingdom must be written on paper previously stamped.

An ordinary agreement or memorandum of agreement must be stamped with a sixpenny stamp An adhesive or ordinary postage stamp may be used, but such stamp must be cancelled by the party first signing the agreement. If an agreement is not stamped with an adhesive stamp when it is made, it must be stamped with an impressed stamp within fourteen days of having been made, or by paying the penalty it may be stamped at any time An agreement the subject matter of which is not of the value of £5; an agreement for the hire of any labourer, artificer, or menial servant; an agreement for the sale of goods, whatever be the price; and an agreement between the master of a ship and a seaman for wages from one port to another within the United Kingdom, are exempt from stamp duty.

Receipts.—A receipt for the payment of money to the amount

of £2 or more must be stamped with a twopenny stamp, which may be adhesive if affixed before the receipt is given. It may be stamped with an impressed stamp within fourteen days after it has been given. If any person gives a receipt for £2 or more without a stamp he is liable to a fine of £10; and if any person refuse to give a receipt duly stamped for any payment of £2 or more he is also liable to a fine of £10. There does not seem to be any legal obligation upon a creditor to give a written receipt for a payment of under £2.

A receipt is the best evidence of payment; but a person who has paid a debt may prove payment in any other legitimate way. And although a receipt is good evidence of payment, it is not conclusive evidence, unless it is contained in a deed; for it is open to a creditor to prove, if he can, that although he gave a receipt he never in fact received the money.

ASSIGNMENT OF CONTRACT

A person who wishes to enforce a contract against another must prove that he is a person entitled to enforce it. As a rule, he does this by showing that he is an original party to the contract; but sometimes his right to enforce the contract depends on assignment from an original party.

Assignment of Obligation.—Where there is a contract between two parties, it is clear that one cannot, without the consent of the other, assign the burden of the contract to a third person so that such a person becomes liable to fulfil the obligation in his stead and he himself is discharged. If this were otherwise a debtor could avoid liability by assigning the burden of his debt to a pauper, and so defraud his creditor.

A person may, however, in many cases fulfil his obligation by the act of another. For example, a coal merchant under contract to deliver coal may arrange with another coal merchant to deliver the agreed amount of coal for him, and the other

party to the contract has no right to complain if he gets what he contracted for. But a party bound by a contract involving the exercise of personal skill or superintendence on his part may not fulfil this obligation by the act of another. Thus, an engineer employed to report on the value of a mine could not carry out his contract by employing another person to make the report to him, nor could an artist employ another artist to carry out the duty of painting a portrait.

Assignment of Benefit.—But a party who is entitled only to the benefit of a contract may in general assign the contract so as to substitute for himself another person who by the assignment obtains the right to enforce the contract. Thus, if B owe A £100, A may assign to C his right against B. Then C becomes B's creditor instead of A, and B is bound to pay the £100 to C. A creditor, however, can only assign his debt by a writing, and notice of the assignment must be given in writing to the debtor.

But if the debtor has on his side any right against the creditor which he could claim to set off against the creditor, if the creditor were to sue him for the debt, the creditor can only assign his right subject to this right of set-off which the debtor has. Thus, if A had lent B £100, and B had sold goods to A on credit for £30: if A were to sue B for the £100, B would be entitled to set off against the debt the £30 due to him from A, and A could only recover £70. If, then, A assigns his debt to C, and C sues B for the £100, B has the same right of set-off against C as he would have had against A.

The assignment of rights under negotiable instruments will be dealt with later.

TERMINATION OF THE CONTRACT

The obligation under a contract may come to an end, (1) by mutual agreement between the parties; (2) by fulfilment of the obligation; (3) by breach of the contract; (4) by lapse of

time; (5) by fulfilment becoming impossible; (6) by operation of law.

Mutual Agreement.—It is clear that when parties have agreed to be bound by a contract, they may agree afterwards that each shall be released from his obligation. If each of two parties is by a contract bound to do something, the release of one is good consideration for the release by him of the other. And if one party agrees to release the other from his obligation in consideration of that other doing something different from what he was bound to do by the contract, the obligation under the contract is at an end when the substituted duty has been performed. Thus, if A has lent B £100, and they agree that A shall release B from his obligation to repay the £100 on B handing over a certain picture to A, as soon as B has delivered the picture (whatever its value may be) he ceases to be under any obligation to pay the £100 But a promise to forgive a debt without consideration is not binding, unless under seal; nor is a promise to accept less than the amount which is due in satisfaction of the whole. For example, if A has lent B £100, and B has failed to repay the money at the time agreed, and if A then promises to forgive B the balance if he will repay £50 at once, this promise is not binding on A, for there is no consideration for it. The payment of the £50 by B is only a payment of money due under the contract, *i.e.* money which he was bound to pay irrespective of A's promise. Hence B, having paid the £50, may be sued for the balance of the debt in spite of A's promise. But if A were to agree to release B from the balance of the debt for a payment of £50 and a book worth a few shillings, or for a payment of £50 and a bill of exchange for the other £50, in either case B would be released, for he is doing something in consideration of A's promise which he was not bound to do by the original contract.

Performance.—When one party has fulfilled his obligation or performed his part of the contract it is obvious that his obligation under the contract has come to an end. It is

important, however, that he should perform his part exactly, unless the other party has agreed to vary the nature of the performance. Thus, the sending of a cheque for the amount of a debt is not payment of the debt, unless the creditor agree to accept a cheque. In the absence of any such agreement a debt can only be lawfully discharged by the payment of cash. A debtor who makes a legal tender of the amount of his debt is discharged from his obligation whether the creditor accepts the tender or not. To constitute a legal tender the exact sum due must be actually shown and offered to the creditor in such a way that he can take it if he chooses. Gold coin may be offered as legal tender by anyone up to any amount. Bank of England notes also are legal tender by anyone except the Bank itself. Silver coin is only legal tender to the amount of 40*s.*, and bronze to the amount of 12*d.* If A assert that B owes him £10, and B maintain that his debt is only £8, and if B make to A a legal tender of £8, which is refused, B is entitled to judgment in his favour in an action by A for the £10 if the Court determine that not more than £8 is due. But a defendant is not allowed to avail himself of the defence of tender without paying into Court the amount he alleges that he has tendered. The offer of a cheque may be equivalent to a tender if the creditor object only to the amount and does not object to the fact that payment is offered by cheque.

Breach.—Where the obligation to perform his part of the contract by one party depends on the performance of his part by the other party, the first is free from his obligation if the second totally fail to perform his part. Thus, when A agrees to buy goods from B, the obligation of A to pay for the goods does not in general arise until B is ready to deliver the goods. And if B refuse to deliver the goods, A is discharged from his liability to pay for them. In such case the aggrieved party has a right of action against the other to recover damages from him for his breach of contract; and if judgment be recovered for damages, the obligation of the defendant under the original

contract has come to an end, and its place is taken by an obligation to obey the judgment.

As a general rule, an action for damages for breach of contract cannot be commenced until the time has passed at which the contract should have been performed; but if one party put it out of his power to do his part, or declares his intention not to do it, the other party may bring his action at once, and need not wait for the time of performance to have passed. Thus De La Tour, in view of a projected trip on the Continent, engaged the services of Hochster to accompany him as courier at £10 a month, the journey to commence at a future specified date. Before that date arrived De La Tour informed Hochster that he had changed his mind and would not require him. Hochster thereupon, without waiting for the specified date to arrive, commenced an action against De La Tour for damages for breach of his contract to employ him. It was held that as De La Tour had definitely renounced his contract, the action had not been commenced too soon.[1]

When a partial breach of contract is committed, the other party cannot repudiate all liability on the contract if he has taken the benefit of part of the consideration for which he agreed. But whenever one party commits either a total or a partial breach of contract, the other party has a right to damages for such breach. The damages recoverable are such as are sufficient to fairly compensate the other party for the loss he has suffered, provided that loss was the natural and direct consequence of the breach.[2]

Lapse of Time.—When a person has a right to call upon another to fulfil an obligation, it is the policy of the law to require him to pursue his legal remedy without undue delay. The law discourages stale claims, and insists upon a person who has a right of action bringing his action within a reasonable time, or not at all.

[1] *Hochster* v. *De La Tour*, 22 L. J. Q. B. 455.
[2] See *post*, pp. 130–132, 179.

With regard to simple contracts, it is provided by the Statute of Limitations of James I.[1] that an action shall be commenced within six years of the cause of action or not at all. When payment of a debt cannot be enforced because of the lapse of time, the debt is said to be statute-barred. Thus, if goods be bought on credit on 1st March, 1902, an action for the price must be begun on or before 1st March, 1908. Unless something has occurred to extend the time, an action begun after that date is too late, the seller of the goods cannot recover the price, and the debt of the buyer is said to be statute-barred. There is nothing in the statute which actually destroys the obligation, it is only the remedy which is barred or destroyed. But if the remedy or means of enforcing a right is withdrawn, clearly the right is of little value. The right, however, still exists, and the protection of the statute is only given to him who expressly claims it.

Several important results follow from the fact that the right still exists. Thus, the executor of the solvent estate of a deceased man is justified in paying the statute-barred debts of the deceased. Again, if a debtor owe his creditor several distinct debts, some of which are statute-barred and others not, and if the debtor pay his creditor a sum of money on account generally of his liability, without intimating that the payment is in respect of any particular debts, the creditor has a right to appropriate the payment to the statute-barred or oldest debts, and if the creditor holds a security he may retain the security although he cannot sue for the debt.

The six years begin to run from the date on which the creditor might have first brought his action. Thus, if goods be bought on credit on 1st March, 1902, under an agreement by which the buyer need not pay the price till 1st March, 1903,

[1] 21 James I c. 16. This Act does not apply to Scotland. In that country there are many different periods of limitation. Thus, on sale of goods or hire the period is five years; on bills of exchange, six years; and on guarantees, seven years. A claim of any sort is barred by the lapse of forty years.

the seller cannot sue for the price until after 1st March, 1903. Therefore he has six years from that day in which to bring his action, and may begin such action at any time not later than 1st March, 1909.

But something may happen to stop the running out of the six years and to cause a fresh period of six years to start from that event. Thus, any payment of principal or interest revives the liability, and the six years count afresh from such payment. Therefore, if A lend B a sum of money at yearly interest, A's right to recover his money by an action may continue for 50 years (or any length of time), provided B continues to pay his interest as it becomes due; and A's remedy is never barred until six years have elapsed from the last occasion on which B paid either interest or something on account of the principal debt.

If two persons are jointly liable for a debt, payment by one, of either principal or interest, may keep the liability alive as far as that one is concerned without affecting the protection given by the statute to the other.[1] Thus, if C guarantee B's debt to A, and B continue to pay interest for over six years, A's remedy against C may be barred, whilst his remedy against B is still available. If, however, it can be shown that a payment, though made by one of two joint debtors, was in fact made on behalf of both, the payment may keep alive the remedy against both. Although payment of part of the principal has the same effect as payment of interest in keeping the remedy alive, this is only so when a sum of money is paid on account of a larger sum admitted to be due. If A allege that B owes him £100, and B only admit that he owes £60, a payment of the £60 by B is not a payment on account of the £100, and will not prevent B from claiming the benefit of the statute and resisting a claim for the £40 on the ground of lapse of time.

Again, when the debtor gives to the creditor an acknowledgment of the debt in writing signed by him, the period of six

[1] 9 Geo. IV. c. 14, 19 & 20 Vict. c. 97, s. 14.

years must begin to be reckoned again from the date of the acknowledgment. To have this effect the acknowledgment must be of such a nature that it amounts to a promise to pay the debt. If a debtor write to his creditor saying, "I admit I owe you the £100, but I cannot pay and will not pay," he acknowledges the debt in a sense, but such acknowledgment is not sufficient to arrest the running out of the six years. To prevent the debt from being statute-barred, the writing must contain either an express or an implied promise to pay. Thus, when the debtor writes, "Kindly give me till this day week to pay you," there is clearly an implied promise to pay by the day mentioned, and the writing, if signed by the debtor, is a sufficient acknowledgment.

If the writing contain a promise to pay on a condition the writing is a sufficient acknowledgment if it can be proved that the condition has been fulfilled. If such proof cannot be given the writing is not sufficient. Thus, where B writes to A to the effect that he will pay A his debt if C pays him (B) what C owes B, this writing is a promise by B to pay A on condition that C pays him If, therefore, it can be shown that C has paid B, the writing may be a sufficient acknowledgment for the purpose of preventing A's remedy against B from being statute-barred; but if C has not paid B, the writing is useless for that purpose.

Where the debtor was out of the United Kingdom at the time the right of action arose the six years do not begin to run in his favour until he returns to the United Kingdom. If, however, he has once returned, the period begins to run on his arrival, and continues to run in spite of the fact that the debtor leaves the United Kingdom again after a very short stay. If the creditor is kept in ignorance of his rights by the debtor's fraud, the period does not begin to run until the fraud is discovered.

A covenant or contract under seal is barred by the lapse of twenty years.

An action to recover land or money charged on land, to recover a legacy, or money secured by a judgment is barred after twelve years.

Though a covenant in a mortgage deed would, on the face of it, appear to be only barred by the lapse of twenty years, it has been held that the limitation of twelve years for the recovery of money secured by mortgage applies equally to an action on the covenant contained in the mortgage deed.

Operation of Law.—On the death of either party to a contract, his rights and liabilities pass to his executor or administrator, unless the contract is of a purely personal nature, *e g.* a contract of marriage. If a party becomes bankrupt his rights and liabilities pass to his trustee, but there are also exceptions to this rule (See Bankruptcy, *post*, p. 95.)

Interest.—*Without special agreement interest is not generally* allowed on a debt even by way of damages after the debt has become due, but there are several exceptions. Thus interest may be claimed: (1) by agreement or custom (in the case of an agreement with a money-lender the rate may be reduced by the court: see *supra*, p. 31), (2) on bills of exchange (5 per cent.) from maturity of the bill; (3) on money obtained by fraud, (4) on debts for which judgment has been obtained (4 per cent.); (5) on payments by a surety; (6) on money bonds with a penalty; (7) by the Civil Procedure Act, 1833. This Act provides that upon all debts or sums certain payable at a certain time the jury may, if they think fit, allow interest to the creditor at a rate not exceeding the current rate from the time when such debts or sums certain were payable, if payable by virtue of some written instrument at a certain time; or if payable otherwise, then from the time when a demand of payment shall have been made in writing, giving notice to the debtor that interest will be claimed from the date of such demand until payment.

PART III

PRINCIPAL AND AGENT

SPEAKING generally, whatever contract a man may make in his own person he may make through the instrumentality of another person whom he has appointed to act for him. A person who is appointed to act thus for another is called an "agent," and the person who appoints an agent to act on his behalf is called in relation to that agent a "principal."

Any person may be an agent, and so bind his principal; thus, an infant, although he is incapable of binding himself, may act as agent and make a contract by which his principal is bound. One party to a contract cannot, however, be agent for the other party to that contract to bind such other party. But the same third person may be agent for both parties to a contract; for example, an auctioneer may act as agent for both seller and buyer of goods, and in the latter capacity may sign a contract of sale on behalf of the buyer.

Appointment of Agent.—An agent may as a rule be appointed without any formality; but an agent appointed to execute a deed for his principal must be appointed by deed. A deed appointing an agent is called a "power of attorney," and by means of such a deed authority may be given to an agent to bind his principal in almost any way. In general, an agent may be appointed by writing or by word of mouth, or his authority may merely be implied from the conduct or course of action of the principal.

Revocation of Authority.—The authority of an agent to act for his principal is in some cases irrevocable, without the agent's

consent, as where it is given to secure some benefit to the agent apart from his remuneration, *e.g.* authority to collect rents until he has repaid himself a debt due from the principal. If the authority is not irrevocable, it is revoked, (1) by the principal actually withdrawing his authority, or by the agent renouncing the agency; (2) by the completion of the transaction which the agent is appointed to conduct, when he is appointed to do only one thing; (3) by expiration of time, when the agent is appointed for a fixed time; (4) by the death of the principal; (5) by the insanity of the principal or agent; (6) by the bankruptcy of the principal. Where a man is agent for a company or a firm, the winding up of the company or the dissolution of the firm is equivalent to the death of an individual principal. When a principal withdraws authority from an agent, such withdrawal will not affect the rights of third persons until they have notice of such withdrawal, in cases where such persons are justified in assuming that the agent still has the authority which he certainly at one time had.

Kinds of Agents.—An agent may be either a special agent or a general agent. A special (or particular) agent is one to whom authority is given to act for some special occasion or purpose which is not within the ordinary course of that agent's business or profession. A general agent is one to whom authority is given to act on behalf of his principal in relation to a matter arising out of the ordinary course of the agent's business, or to act generally for his principal in relation to a particular business of the principal or in matters of a particular nature. Thus, a groom sent by his master to a shop to buy wine would be a special agent, for he is given authority only to act for that one purpose, and it is not within the ordinary course of a groom's occupation to buy wine. On the other hand, a stockbroker employed to buy shares would be a general agent, for he is given authority to act in a matter arising out of the ordinary course of his business. So the manager of a

shop is a general agent, for he is given authority to act generally for his principal, the owner of the shop, in relation to the business of the shop.

Scope of Authority.—This division of agents into two classes is of no importance whatever except when a question is raised as to whether an agent has or has not acted within the scope of the authority given to him by his principal. A principal is legally bound by any contract made on his behalf by his agent to the same extent exactly as if the contract had been made by himself in person, provided the agent acted within the scope of his authority. The scope of an agent's authority, however, means something different in the case of a special agent from what it does in the case of a general agent. The scope of a special agent's authority is limited by his actual instructions. If he act outside his instructions his agreement does not bind his principal.

But in the case of a general agent the principal is bound by any contract made on his behalf, provided the agent acted within the usual scope of the authority of such an agent in a like position Therefore a general agent may bind his principal by a contract made directly contrary to his principal's instructions, provided the contract was one which an agent in that position would usually have authority to make, and provided the other party to the contract does not know that the agent is acting in disobedience to the principal's instructions Thus, if a man keep a livery stable and there sell horses as part of his business, and he direct his servant who is employed in the selling of horses not to warrant the soundness of a certain horse, but the servant, in disobedience to his master's orders, sells the horse with a warranty of soundness, the master is liable on this warranty; for it is in the usual course of business for such a servant or agent who has authority to sell a horse to give such a warranty, and the buyer did not know that in this case the servant was acting in disobedience to his master's orders. But where a doctor gives his coachman authority to

sell his horse, and tells the coachman not to give a warranty with the horse, he is not bound by any warranty which the coachman gives contrary to his instructions; for in this case the coachman is a special agent, not acting in the usual course of his business or of his principal's business. It is a question of fact in each case whether a contract made by a general agent was or was not within the scope of his authority.

Whenever a person by his conduct represents, or allows it to be supposed, that another has authority to act as his agent, he is bound by the acts of that other as if he in fact had the authority he was supposed to have. For example, A, in the ordinary course of his business, sells goods of a certain kind. The owner of some goods of that kind allows them to be on A's business premises A sells the goods to a buyer who believes that A has authority to sell. The owner is bound by this sale as if A really had authority.

Liability of Agent to Third Parties.—An agent who acts within the scope of his authority for a principal whom he names is never himself personally liable under the contract, unless he agrees to be so liable. But if an agent act outside the scope of his authority he runs the risk of having to answer to the other party to the contract for any damage suffered by that party, because of the principal repudiating the unauthorized contract made for him by his agent. For example, Wright being employed as land agent by one Gardner, agreed to let a farm of Gardner's to Collen upon a lease for twelve and a half years, and he gave Collen possession of the farm, professing to have Gardner's authority so to act. On hearing what had happened, Gardner refused to give Collen a lease for so long, alleging that Wright had no authority to make such an agreement It turned out that Wright had exceeded his authority, and as Collen was much inconvenienced by being misled in this way, he brought an action for damages against Wright. The court held that Wright had contracted, or warranted, that he had authority to make the agreement he

made, and that he was liable to pay damages for breach of that contract or warranty.[1]

When a man professes to make a contract as the agent of a principal whom he names, although he may make no specific statement that he has authority to make the contract, it is implied that he warrants that he has such authority; and if it turn out that he has not such authority, he is liable to pay damages for breach of that warranty. This is so even where the agent has had authority, but that authority has been revoked without his knowledge by the death of his principal.

Undisclosed Principal.—When an agent makes a contract without naming his principal, and the other party knows he is dealing with an agent, but does not know who the principal is, the agent himself is personally liable on the contract; but the principal is also liable, and may on being discovered be sued for breach of the contract. In this case, however, it may be shown by the form of the contract that it was not intended that the agent should be personally liable.

Where a person contracts with another whom he does not know to be an agent, but who is in fact an agent, the undisclosed principal is bound by his agent's contract, and is also entitled to enforce it. But when the party contracting discovers that he has contracted with an agent and discovers who the principal is, he has an option, and may treat either the agent or the principal as the party bound to him. He must, however, exercise this option within a reasonable time after discovering the undisclosed principal, or he will be bound to treat the agent with whom he contracted as the principal. Having once made his choice and elected to sue either the principal or the agent, the party is bound by such choice, and cannot afterwards sue the other. For example, Humble, being the owner and manager of a public-house, sold his business to Fenwick, a brewer, and Fenwick appointed Humble manager of the business. Humble's name remained on the door, and

[1] *Collen* v. *Wright*, 27 L. J. Q. B. 215.

the licence was taken out in Humble's name. Humble bought on credit from Watteau a quantity of cigars for sale at the bar of the house. It was contrary to Humble's agreement of employment with Fenwick for him to buy cigars on credit. Watteau had never heard of Fenwick, and believed Humble to be carrying on business on his own account. Watteau, failing to get his money from Humble, and having made inquiries and found that the business belonged to Fenwick, sued Fenwick for the price of the cigars. It was decided that the cigars were such as would usually be supplied to the customers of such an establishment, and that it was within the scope of the usual authority of a person in Humble's position to order such goods for the supply of his customers. In these circumstances, the High Court held that Fenwick, the undisclosed principal, was liable for the price of the cigars, even though his agent had acted in contravention of his instructions in contracting to buy them.[1]

Where a person contracts as agent without naming a principal, and he has in fact got no principal, he is himself liable fully on the contract, and in the absence of fraud may sue upon it.

Where a person knows that another with whom he is negotiating is an agent, and knows who his principal is, but chooses, with the assent of the agent, to give credit to the agent, he cannot afterwards treat the principal as his debtor. Thus, Gandesequi, a Spaniard, authorized Larrazabal, an agent in London, to buy goods for him Larrazabal asked Paterson to supply the goods, and Paterson did in fact, knowing all the facts, send the goods to Gandesequi to Spain. Paterson, however, with his consent, debited Larrazabal, and not Gandesequi, in his books with the price of the goods. Soon afterwards Larrazabal became bankrupt, and Paterson sued Gandesequi. It was held that Paterson, having made his choice, must abide by it, and could not succeed against the principal, to whom he

[1] *Watteau* v. *Fenwick* (1893), 1 Q. B. 346.

had not given credit.[1] An agent is also personally liable where he executes a deed in his own name, even though he describe himself as an agent; and he is liable if he signs a bill or promissory note, unless he uses words clearly excluding personal liability. And generally by mercantile usage, where an agent buys or sells goods in the United Kingdom for a principal abroad it is presumed that the agent acts as principal, and cannot pledge his principal's credit or avoid personal liability without express authority so to do and the assent of the other party to the contract.

Fraud of Agent.—Where an agent acting within the scope of his authority is guilty of fraud committed in the supposed interest of his principal, the fraud of the agent is the fraud of the principal; and the principal is under the same liability for his agent's fraud as if he had committed the fraud himself, even if he knew nothing of it nor in any way authorized or approved of it. To make the principal liable, however, the false representation made by the agent must have been of such a kind as it was within the scope of the agent's authority to make. Thus, it is within the scope of the authority of a general agent for the sale of his principal's goods to make representations as to the quality of the goods; if, then, such an agent make a false and fraudulent representation as to the quality of goods, his principal is responsible, even if he had forbidden the agent to make such representation. Where a principal intentionally conceals from his agent some fact in connection with his business which the agent ought to know, in order that the agent may make false representations relating to that fact, and the agent makes such representations in good faith believing them to be true, the principal is guilty of fraud. The principal is liable for his agent's fraud, whenever the fraud is committed within the scope of the agent's authority, even though it is committed by the agent entirely for his own private ends and not for the benefit of his principal. In all

[1] *Paterson* v. *Gandesequi*, 15 East 62.

cases of fraud by an agent, whether the principal is liable for his agent's fraud or not, the agent himself is liable for his own fraud.

Ratification.—If an agent make a contract for his principal outside the scope of his authority, or a person make a contract for another without authority, the principal (or supposed principal) may if he choose ratify the contract. Ratification takes place if the principal, with full knowledge of the facts, adopts the contract as his own. He cannot ratify a void or illegal act; nor can he ratify unless he was in existence at the time when the act was done which he seeks to ratify. Thus a company cannot ratify an act done by its promoter before the company came into existence. He will be held to have ratified the contract if he does any act inconsistent with repudiation of the agent's authority. He cannot ratify part of the contract and repudiate the rest; he must either admit the authority of the agent entirely or reject it entirely. If he ratify, then the parties are in exactly the same position as if the agreement were fully authorized from the beginning, and as if the self-appointed agent had authority to make the contract which he made.

Delegation of Authority.—An agent cannot in general carry out his duties through a sub-agent, or appoint any other person to act for him, so as to make the principal liable on contracts made by such sub-agent. Confidence in the particular person employed is at the root of the relationship between principal and agent; and it is clear that a man may have perfect confidence in the discretion of A to transact his affairs, but may not have the same confidence in A's discretion to select another person to transact them. But the agent may appoint a sub-agent if he have the principal's authority so to do; and this authority may either be express or implied from the conduct of the principal, the usage of a particular business or the nature of the business. Also, where in the course of business unforeseen emergencies arise which impose upon the

agent the necessity of employing a substitute in order to save the principal's interests from injury, the agent has implied authority to appoint a substitute, and the principal is bound by the acts of such substitute.

Rights inter se.—As to the rights of principal and agent *inter se*, these are of course regulated by the agreement between them; but it is implied that the principal must indemnify the agent against all costs, charges, and expenses which the agent has properly incurred in transacting his principal's business.

Again, as the relationship between them is one of great confidence, the agent must make no profit for himself out of his principal's business without the full knowledge and assent of his principal. And if the agent has any personal interest in any business which it is his duty to transact for his principal, he must make full disclosure of such interest to his principal. Hence, where an agent is employed to buy goods, he cannot without the principal's consent buy his own goods; and if he be employed to sell goods, the agent cannot without the principal's consent buy them himself. In either case the agent's duty to his principal would be opposed to his own self-interest. If an agent make any secret profit out of his agency, the principal has a right to recover such profit from him; for he must account to his principal for every penny he receives. So that secret commission paid to the agent by the other party to a contract may be recovered by the principal. But a principal has a right to repudiate a contract entirely when his agent has been induced to make the contract by a bribe, and has a right of action for fraud against both the giver and the acceptor of the bribe. An agent who receives a bribe also forfeits his current salary and all claim to commission. It is a criminal offence, punishable by heavy fines and long term of imprisonment, for an agent corruptly to accept, or for any person corruptly to give to an agent, any gift or consideration given to induce the agent to do or forbear from doing any act in relation to his principal's business.

Mercantile Agents.—A "mercantile agent" is one who in the ordinary course of his business as agent has authority as such agent to sell or buy goods, or to consign goods for the purpose of sale, or to raise money on the security of goods. Clearly mercantile agents are general agents.

Factors are an important class of mercantile agents. A "factor" is an agent to whom goods are entrusted for the purpose of being sold on behalf of the owner. He is usually paid by his principal by way of commission upon the price he receives for the goods he sells, and is often called a "commission agent." A factor as a rule sells in his own name, and often sells goods of which he is himself the owner Hence, a buyer from a factor does not usually know who is the owner of the goods he buys. Whenever a factor is, or has been, in possession of goods with the consent of the owner, any sale or pledge he may make in the ordinary course of his business gives the buyer or pledgee a good title to the goods, provided the buyer acts in good faith and has no notice that the factor is selling or pledging without authority or that his authority has been withdrawn. But the sale or pledge in order to be valid must be for valuable consideration If the agent pledges goods as security for a debt due to him before the time of the pledge, the pledgee acquires no further right to the goods than the agent himself possessed at the time of the pledge. The contract is subject to all the rules above stated as to the liability of an undisclosed principal; and therefore if there be a breach of contract on the part of the seller, the buyer may sue either the factor or the principal; and if there be a breach of contract on the buyer's part, either the factor or the principal may sue. But if the buyer be a creditor of the factor, and he buys goods from the factor not knowing that the factor is acting as the agent for another, the buyer has a right to set off the debt due to him from the factor against the price of the goods, even though the goods do in fact belong to a third party. For example, a certain firm of factors dealt in cloth, selling from

their warehouse sometimes on commission for other persons, and sometimes on their own account. They had in their warehouse a large quantity of cloth belonging to George. Also, they were indebted to Clagett to the extent of £1,200. In these circumstances, Clagett bought from the factors a quantity of cloth, some of which was George's cloth. Clagett, however, had no reason to suppose that the whole lot did not belong to the factors. George, having ascertained that a large quantity of his cloth had been sold to Clagett, and not having been paid, brought an action against Clagett for the price. Clagett's defence was that the factors were indebted to him in a larger sum than the price of the goods, that he did not know the factors were selling the cloth as agents, and that therefore he was entitled to set off the sum due to him from the factors against the price of the goods. This contention was successful.[1]

A " broker " is an agent who buys or sells goods or shares for a principal on commission. If he be a broker of goods he is a mercantile agent, and accordingly a general agent. A broker is distinguished from a factor chiefly by the fact that a broker does not have possession of the goods he sells, nor does he sell on his own account, while a factor has the actual possession of the goods of his principal, and does sell on his own account. Hence, a person dealing with one who professes to be a broker must assume that he is dealing with an agent, while no such assumption need be made in the case of a factor.

An " auctioneer " is a person authorized to sell property on commission at a public auction. He has legal possession of the goods he sells, a lien [2] upon goods in his possession for his charges, and the right to sue for the price of the goods he sells. He is also in general liable to be sued by a buyer to recover the goods sold. An auctioneer is the agent of the owner of the property to sell the property, and when he accepts a bid

[1] *George* v. *Clagett*, 7. T. R. 359. [2] See *post*, pp. 127, 185.

he becomes the agent of the buyer to sign a contract of sale. His signature is sufficient to bind both seller and buyer. He has no implied authority to sell by private treaty, or to warrant goods, or to accept payment in any form except cash, or to give credit, or to rescind a sale. He is bound to accept the highest *bona fide* bid; but a bid may be withdrawn before it is accepted by the fall of the hammer.

An agent for the sale of goods sometimes acts under an agreement with the principal by which in return for a higher commission than usual he undertakes that in the case of all goods which he sells the principal shall be paid the price. Such an agreement is called a *del credere* agreement. His agreement with his principal clearly may result in his becoming liable for the debt of another, in case the buyer makes default in payment; but in spite of the Statute of Frauds the agreement is good without writing, for the main purpose and immediate effect of the agreement is not to give a guarantee, but to prevent bad debts from arising.

Bailees.—Any person to whom goods are entrusted by the owner for any purpose is called a "bailee." Thus, a factor is a "bailee"; so is a carrier, a warehouseman, a borrower, or a hirer.

PART IV

PARTNERSHIP

PARTNERSHIP is the relation which subsists between two or more persons who carry on a business in common with a view of profit.[1] But the members of a company are not partners. The persons who carry on a business for profit in partnership are called collectively a firm, and the name under which the business is conducted is called the firm-name. This firm-name may be quite distinct from the names of any of the persons who compose the firm. Thus, A and B may trade as " C and Co.," but in such a case the firm, with the true name of each partner, must be registered and the true name of each partner must be mentioned in all trade circulars, business letters, etc. A firm cannot legally consist of more than twenty persons, or if the business be banking, of more than ten persons. If more than twenty persons desire to carry on a business legally in common, they must register themselves as a company, as will be explained later.

A firm may own property, and may be a party to a contract, and may sue or be sued in the firm-name.

Who is a Partner.—A person who has no share in the profits of a business cannot be a partner, but any person who does share in the profits is presumed to be a partner in the business. Thus, Erasmus Carver and William Carver, ship agents, made an agreement with Giesler, also a ship agent, by which the Carvers were to carry on business at one port and Giesler at another. Each house was to do the utmost to persuade ship owners whose ships used the other port to employ the other

[1] The law on the subject of partnership is mostly contained in the Partnership Act, 1890. See "Registration of Business Names Act, 1916."

house. They were to share in agreed proportions the commissions earned and the profits made, but each house was to be answerable only for its own losses and its own acts, and not for those of the other house. Giesler incurred a debt in the business which he was unable to pay. In spite of the agreement that each house was to be liable only for its own losses, it was held that the Carvers and Giesler were really partners, and that the Carvers were answerable for the debt of Giesler.[1]

The fact that a person shares in the profits of a firm is, however, not conclusive evidence that he is a partner; thus, a creditor may receive his debt by instalments out of the profits of a firm; or a servant or agent may be remunerated by a proportion of the profits; or the widow or child of a deceased partner may receive a portion of the profits by way of annuity, without necessarily being a partner in the business. Also, where a person lends money to another engaged in business, on a contract by which the lender is to receive a rate of interest varying with the profits, or a share of the profits, such loan does not of itself make the lender a partner in the business, provided the contract is in writing signed by all parties thereto. And a person who sells the good-will of a business may, as part of the price, continue to receive a portion of the profits without being necessarily a partner. But in either of these two last-mentioned cases, if the person actually carrying on the business become bankrupt, the person entitled to receive part of the profits can receive nothing out of the bankrupt's estate until all the ordinary creditors of the bankrupt have been paid in full.

It must in every case be a question of fact whether or not a person is, or is not, a partner in a business. If he shares in the profits of the business he is presumed to be a partner; but he may show that although he shares in the profits he is not in fact a partner. When a person does not intend to be a partner, and when the business is not carried on for him, he is

[1] *Waugh* v. *Carver*, 14 R. R. 845.

not a partner. But if a person holds himself out as a partner in a business, he is liable as if he were a partner to anyone who gives credit to the firm in the belief that he is a partner.

The question whether a person is a partner in a business is of great importance; for each partner is liable for all the debts of the firm incurred while he is a partner.

A dormant partner is one who, although sharing in the profits, takes no part in the management of the business of the firm; whose name does not appear, and who is perhaps not actually known to be a partner. Such a partner is, however, equally liable with other partners. A partner is not liable for debts incurred by the firm before he became a partner. Neither is a person who ceases to be a partner liable for debts contracted after he has left the firm But when a person who has ceased to be a partner, or who never was a partner, allows others to believe that he is a partner, he is liable as if he were a partner to anyone who gives the firm credit in that belief. A person who thus allows his name to be used as if he were a partner, when in fact he is not a partner, is called a nominal partner.

Liability of Partners.—The liability of a partner is joint with all the other partners, not several.[1] That is to say, there is only one liability on the part of the firm, not separate liabilities on the part of each partner. The creditor may sue some or all members of the firm, but he can only bring one action. But a single member of a firm, against which judgment has been obtained, may be compelled out of his private property to satisfy the judgment; for if the property of the firm is not sufficient to satisfy the firm's debts, each partner is liable for these debts to his last penny. When a partner dies his estate is severally liable for the debts of the firm, and his executors may be sued without joining the other partners. But a partner's private creditors are always [2] entitled to be

[1] In Scotland each partner is severally liable as well as jointly.
[2] In England and Ireland, not in Scotland.

paid out of his private property before creditors of the firm; and creditors of the firm are entitled to be paid out of the firm's property before any partner's private creditors are paid out of that partner's share in the firm's property.

Liability of the Firm.—The business of a firm is generally transacted by agents for the firm. The firm is the principal, and the question of the firm's liability for its agents' acts depends upon the general principles of the law of agency. Every partner is an agent of the firm and of the other partners for the purpose of the business of the firm, and binds the firm and all the other partners by every act committed within the scope of that business. A contract made by any partner, either with the authority of all the other partners or in the ordinary course of the firm's business, is binding upon the firm. But a contract made by a partner without his partner's authority, and outside the ordinary business of the firm, is not binding on the firm. Thus, where a partner in a firm of drapers without authority agrees to buy agricultural machinery in the firm's name, the firm is not bound by the contract, as it is one outside the ordinary business of the firm; but the firm is bound if that partner, although forbidden to do so by the other partners, buys linen in the firm's name, for that is a transaction within the ordinary course of a draper's business. Again, in the case of a trading firm it is within the course of the business to accept bills of exchange in the firm-name, but it is not so in the case of non-trading firms. Hence a bill of exchange accepted in the firm's name by a partner in a firm of metal-brokers, which is a trading business, is binding on the firm even though the partner was, in accepting the bill, acting without authority or contrary to his agreement with his partners; but a bill accepted in the firm's name without authority by a partner in a firm of solicitors, which is a non-trading business, does not bind the firm.

It may be that, as between themselves, a certain partner has no authority to bind the other partners, but that fact does

not affect a transaction between that partner and a person who has no knowledge of the private arrangements between the members of the firm. If, however, a partner make a contract outside the scope of his authority with a person who knows he is acting outside such scope, or with a person who does not know or believe him to be a partner, the firm is not liable on such contract. Where partners agree that any restriction shall be placed on the power of any partner to bind the firm, no act done by that partner in contravention of such agreement is binding on the firm in favour of any person who has notice of the agreement.

Relation of Partners inter se.—As between themselves, the relationship between partners depends on the agreement they make. An agreement in writing for a partnership is called articles of partnership. It is not necessary, however, that such agreement should be in writing; it may be made verbally or even implied from the conduct of the parties. The nature and value of the duties or interest of any partner may vary from those of any other partner to any extent. Thus, of two partners, one may find all the capital and the other all the skill; or one may take three-quarters of the profits and the other only one-quarter; or one may entirely control the business and the other may do nothing but receive his share in the profits.

In the absence of agreement, however, all partners are entitled to share equally in the capital and in the profits of the business, and all must contribute equally toward the losses of the firm. Every partner is entitled to be indemnified by the firm for liabilities incurred in the proper conduct of the firm's business. He has the right to take part in the management of the business and to inspect the books, but he is not entitled to any remuneration for his work, or to interest on his capital in the business. He may carry on a private business of his own in addition to the firm's business (unless forbidden to do so by his agreement, or required to devote the whole of his

time to the firm's business), but he may not carry on a competing business or make a private profit out of the use of the partnership property, name, or connection. Thus, if a member of a firm of timber merchants has a private ladder-making business and obtains his wood from the firm at a reduced price, he must account to the firm for the profit so made.

When any difference arises as to ordinary matters connected with the business, the majority of the partners have the right to decide such difference; but no change can be made in the nature of the business, nor can any new partner be introduced, without the consent of all the partners. No majority of the partners can expel a partner from the firm unless there was an express agreement between them that a majority should have such power.

Assignment of Partner's Interest.—A partner may assign or charge his interest in the firm, but the assignee cannot interfere with the management of the business, for that would be equivalent to introducing a new partner. He can merely receive the share of the profits to which the assignor would have been entitled, and must accept the accounts agreed by other partners, and any arrangements made by them, unless made in bad faith with a view to depriving him of his rights.

The interest of a partner may also be charged in favour of his private creditors, and a receiver of his share of the profits may be appointed in their favour by the Court.

Dissolution.—A partnership agreement sometimes provides that the partnership shall continue for a fixed time, sometimes there is no such provision. Where no fixed time is agreed for the duration of the partnership it is called a partnership at will, and any partner may end such a partnership at any time on giving notice of his intention so to do to all the other partners. Where a fixed time is agreed, the partnership is dissolved at the expiration of that time; but if the business is continued after that time without fresh agreement, the rights and duties

of the partners continue as before, so far as is consistent with a partnership at will. If a partnership agreement is made for the purpose of carrying out a single undertaking, the partnership is dissolved by the completion of the undertaking. The death or bankruptcy of a partner also dissolves the partnership.

Whether entered into for a fixed time or not, the Court may upon the application of a partner decree a dissolution of the partnership whenever in the opinion of the Court such dissolution is necessary. In particular, dissolution may be decreed whenever any partner becomes insane; when a partner, other than the partner asking for dissolution, becomes in any other way permanently incapable of performing his part of the business, or is guilty of misconduct prejudicial to the business, or wilfully or persistently commits a breach of the partnership agreement, or so conducts himself that it is not reasonably practicable to carry on the business in partnership with him; or whenever the business can only be carried on at a loss.

When a partnership is dissolved the first step is to realize the property of the firm and to pay the creditors. These are paid first out of any profits which have not been distributed, next out of capital, and if more is required each partner must contribute in the proportion in which he is entitled to share profits. When the outside creditors are satisfied, debts due from the firm to the partners individually must be paid, for a partner may himself be a creditor of his firm. Next in order, the partners are to be paid rateably what is due to each in respect of capital, and the remainder, if any, is divided amongst the partners in the proportion in which profits are divisible.

Goodwill.—An important asset of the firm is its goodwill, which has been defined as "the probability that the old customers will resort to the old place." The purchaser of the goodwill cannot prevent the former members from carrying on a competing business, but they may not solicit customers of the old firm, or use the firm-name, or in any way represent themselves as carrying on the old business.

Limited Partnerships.—By an Act of Parliament [1] which came into operation on 1st January, 1908, a novel feature was introduced into the law of partnership. A person may, subject to certain conditions, become a partner in a firm with limited liability. He must contribute to the capital of the partnership a sum of money, and may become entitled to share in the profits of the business without being liable for the debts of the firm beyond that sum. Such a partner is called a "limited" partner, while the others or ordinary members are called "general" partners. A limited partnership must be registered, and there must be at least one general partner liable for all the debts. A limited partner must take no part whatever in the management of the business of the firm, nor can he act as agent of the firm If he take any part in the management of the business he becomes liable as a general partner. The death, bankruptcy, or lunacy of a limited partner does not cause dissolution of the partnership

[1] Limited Partnership Act, 1907.

PART V

COMPANIES

Object of Incorporation.—It is obvious that by association and contributing money to a common fund a number of men may together engage in commercial transactions which one alone would be unable to undertake. But under the common law they cannot so unite except as partners or by incorporation.

Partners, however, are as a rule under unlimited liability for the debts of their firm; while incorporation could only be acquired with difficulty. Two things therefore are necessary if such joint commercial enterprises are to be encouraged: these are first, some restriction of the risk run by those who contribute their money, and secondly, facility of association. These two things have for long been provided by a series of Acts of Parliament.

Certain kinds of companies, such as railway companies, are almost invariably created by special Acts of Parliament, which define their powers and the nature and limits of their business. The greater number of companies, however, have been formed under a group of general Acts, called the Companies Acts, for which is now substituted the Companies Act, 1929, which provides a code of the law on the subject.

Nature of a Company.—It is unlawful for a partnership to consist of more than twenty persons if the object of the association is the acquisition of gain; and if the object is banking it is unlawful for a partnership to consist of more than ten persons.

If more than twenty persons (or ten if the business is banking) desire to carry on any business in association, they

must register themselves as a company, unless they are incorporated by the Crown or by special Act of Parliament.

A registered company may either be limited or unlimited. If it is unlimited each member is in the same position with regard to liability for the debts of the company as is a partner in a firm. In most companies, however, the liability of the members is limited. Liability may be limited in two ways—either by shares, which is the commonest way, or by guarantee. When a company is limited by shares no member is liable to contribute more to the assets of the company than the nominal value of the shares which he has agreed to take; and if the company be wound up, he cannot be called upon for more than the amount which remains unpaid on his shares. Where a company is limited by guarantee, each member undertakes to contribute a certain sum to the assets of the company in case it is wound up, and he is liable for no greater amount.

A company limited by shares is the only kind of company discussed in the following pages.

Companies contrasted with Firms.—The position of a member of a limited company differs in many important respects from that of a partner in a firm. Partnership depends essentially on mutual confidence between the partners, and each partner is assumed to have equal rights with every other partner in relation to the business and its management. A member of a company, however, is in no relationship of confidence with other members, and has, as such, no right to interfere in the management of the business, which is conducted by certain members only, elected by the company, who are called directors. Again, a partner is so identified with his firm that the firm's debts are his debts, and his liability for those debts is unlimited; but the limited company is a fictitious person quite separate from its members; its debts are not the debts of the members, and no member who has fulfilled the contract he made with the company when he agreed to take his shares is under any further liability to contribute to its assets.

Formation of a Company.—Any seven or more persons[1] associated for any lawful purpose may, by subscribing their names to a "Memorandum of Association" and registering it at Somerset House in the prescribed manner, form an incorporated company, with limited liability.

This Memorandum of Association must state—

(i) The name of the company, with "Limited" as the last word in its name;
(ii) Whether the registered office of the company is to be situate in England or in Scotland,
(iii) The objects of the company;
(iv) That the liability of its members is limited;
(v) The amount of share capital with which the company proposes to be registered, and the division thereof into shares of a fixed amount.

No subscriber may take less than one share, and each must write opposite his name the number of shares he takes.

The Memorandum must be stamped as a deed, and the signature of each subscriber must be witnessed. The name taken must not be identical with that of any other existing registered company or so like as to be calculated to deceive.

A company may by special resolution, approved by the Board of Trade, change its name.

A company may by special resolution alter the provisions of its Memorandum of Association with respect to the objects of the company so far as may be required to enable it to carry on its business more economically or efficiently, or in a different locality, or to carry on some additional business, or to abandon some of its objects. Such resolution, however, has no effect unless approved by the Court which, in exercising its discretion, has regard to the rights and interests of creditors, debenture holders, and all classes of members.

Articles of Association.—There may be registered with the

[1] Or two in the case of a private company (*post* p. 84).

Memorandum of Association a document called the "Articles of Association," which must be signed by each of those who signed the memorandum. This document contains regulations for the management of the company. It may provide for the manner of issue and nature of the shares, the time and conduct of meetings, the number, election, remuneration and powers of the directors, and many other matters.

By becoming a member of the company any person becomes bound by the Articles of Association as if he had signed and sealed the document as his deed, and he becomes liable as the debtor of the company for all money payable by him thereunder.

Certificate of Incorporation.—On registration being completed the Registrar gives a Certificate of Incorporation, from the date of which the persons becoming members of the company form a corporation, and which is conclusive evidence that the requirements as to registration have been complied with.

Register of Members.—Every company must keep in a book or books a register of its members. This must contain the names and addresses of the members, a statement as to the shares each holds (distinguishing each share by its number), and a statement as to the amount paid on each share. It must also contain the date when any person becomes a member or ceases to be a member.

The Promotion of a Company.—A person who takes part in setting a company going is a "promoter." The promoters, having started the company, in most cases desire to raise capital for the projected business by inviting the public to subscribe for shares. This invitation is usually given by a circular or advertisement called a "prospectus." Every prospectus must be dated and must be signed by every person named therein as a director or proposed director, and a copy must be filed at Somerset House before publication. It must contain a number of particulars, including the minimum amount required to be raised for preliminary expenses, working capital, etc., the

number of shares issued otherwise than for cash and the consideration for which they were issued, the names and addresses of the vendors of any property to the company when the property is to be paid for out of the money subscribed or by shares, the amount paid as commission for procuring subscribers, the amount paid or intended to be paid to any promoter and the consideration for such payment, the dates and parties of material contracts, and particulars as to the nature and extent of the interest (if any) of every director in the promotion of the company or in the property to be acquired.

When a prospectus is published inviting persons to subscribe for shares, every person who is a director (or who is named as a director with his authority), every promoter and everyone who has authorized the issue of the prospectus, is liable to pay compensation to all persons who subscribe for shares on the faith of any untrue statement therein and who suffer loss thereby; unless he can prove that he had reasonable ground to believe the statement to be true, or that the statement is a correct and fair copy of a report or valuation made by a person whom he reasonably believed to be competent to make it, or that the statement is a correct representation of a statement made by an official person or contained in a public official document; or unless he can prove that he withdrew his consent to become a director before the issue of the prospectus, or that it was issued without his knowledge or consent and that he gave public notice to that effect as soon as he was aware of its issue, or that after its issue and before the allotment of shares he became aware of any untrue statement and gave public notice of the withdrawal of his consent and the reasons therefor.

The Capital of a Company.—A person becomes a shareholder in, or a member of, a company by agreeing to buy a share or shares and having his name entered on the register of members. Each share is of the nominal value stated in the Memorandum of Association, which may be £1, £10, or £100 or any fixed amount. No one can be the owner of part of a share, but

several persons may jointly be the owners of a share. The "capital" of the company may mean one of several different things: the "nominal" capital is the nominal value of all the shares which the company has power to issue: the "issued" capital is the nominal value of the shares actually taken: the "paid up" capital is the amount actually paid on the shares.

The capital is originally divided into shares, but when the shares have been fully paid up the capital may be converted into stock. A share is indivisible and a person can only own a whole number of shares; but a person may be the owner of any fraction of the capital if it is stock. Thus, if a company's capital were stock a man might be the owner of £117 11*s.* 6*d.* worth of such stock according to its nominal value. But if the capital consisted of £5 shares the nominal value of any member's interest must be a multiple of £5, as he must be the owner of a whole number of shares. A company, if so authorized by its Articles, may increase its share capital by the issue of new shares.

A company can only reduce its capital if so authorized by special resolution confirmed by the Court.

Shares.—A person applying for a share becomes the owner of it by allotment, *i.e.* by the share being appropriated to him and his name being entered on the register as the owner. No allotment may be made unless the amount stated in the prospectus as the minimum amount required to be raised for preliminary expenses, working capital, etc., has been subscribed, and the sum payable on application for the amount so stated has been paid to the company. The object of this provision is to ensure that the company shall have sufficient working capital at the outset. An application for shares is an offer to buy shares, and such offer may be withdrawn until it is accepted. It is accepted by notice of allotment.

On allotment the company issues to the member a certificate that he is the owner of so many shares.

The shares which anyone holds in a company can only be conveyed or sold to another by a deed called a transfer. When such a deed of transfer has been executed by the party selling and the party buying, it is sent to the office of the company along with the certificate given to the seller. The transaction is then registered in the books of the company, the buyer's name being inserted in those books instead of the seller's name as the owner of the stock or shares transferred. The certificate given to the seller is cancelled, and a new certificate given to the buyer. On this registration of the transfer being completed, the buyer becomes a shareholder in the company in the place of the seller.

The ownership of a share gives the right to participate in the profits of the company. A "dividend" is that portion of the profits to which a shareholder is entitled.

"Preferred" (or "preference") shares are shares which entitle the holders to a dividend out of the profits of the company before the holders of other shares get anything Preference shareholders as a rule are entitled to a fixed rate (say 5 per cent.), and get nothing more than their fixed dividend, however great the profits of the company may be. They may, however, hold "participating preference shares" entitling them to a share of the profits in addition to their fixed dividend, provided the ordinary shares produce a stated dividend.

"Ordinary" shares are those which entitle the holders to divide between them the profits of the company after the preference shares have been provided for.

"Deferred" shares are shares upon which no dividends are payable until the ordinary shareholders have been paid dividends up to a certain rate. They are usually held by the promoters of a company. For example, there may be deferred shareholders who are entitled to no dividends until the ordinary shareholders have been paid 8 per cent, then they share the rest of the profits with the ordinary shareholders.

Shares are often not fully paid up. For example, the shares

are at the nominal value of £20, but each shareholder has only paid £7. He is, however, liable at any time to be called upon to pay all or part of £13 unpaid on each share. These "calls" must be made in the manner provided for in the Articles or they are not valid. If a call is not complied with the amount called for can be recovered as a debt from the shareholder to the company. The Articles may provide that shares are forfeited on non-payment of a call.

Debentures.—A debenture is a document given by a company which acknowledges that the company is indebted to the person named, or to the bearer, in a certain sum. This document usually gives the holder a charge upon the property of the company. A person advancing money on a debenture lends his money to the company and so becomes a creditor of the company. The debt of the company may be secured by a mortgage of definite property; or it may be a "floating" charge, *i e* a charge on all the property which the company may be possessed of at any time A floating charge does not affect any particular property so as to prevent the company from dealing with it. Every mortgage or charge to secure debentures must be registered at Somerset House.

If a company offer debenture *stock* to the public an investor may advance any odd sum of money and become the creditor of the company for that amount. Otherwise money is borrowed on debentures in multiples of a definite sum, so that there are £10 debentures or £100 debentures, etc. There is a similar distinction between debentures and debenture stock to that between shares and stock.

Directors.—The directors of a company are persons appointed by the members to manage the business in the interests of all the shareholders. The first directors are generally named in the Articles, and no company except a private company may have less than two. If the Articles require (as is usual) that no one may be a director unless he is the holder of a certain number of shares, such qualification must be stated in the prospectus,

and the company may not start business until each director has paid for the required number of shares. An undischarged bankrupt cannot be appointed a director except by leave of the Court which adjudged him bankrupt. The Articles also usually state the number, mode of election and removal, remuneration and powers of directors, and further enact that directors shall only act provided a certain minimum number (called a quorum) are present at a meeting. Every director is an agent of the company and binds the company by contracting on behalf of the company provided he contract within the scope of his authority.

Meetings.—Within not less than one month or more than three months, from the time a company is entitled to commence business, a general meeting of the members must be held, called the "statutory meeting." Before this meeting every shareholder is entitled to a report, giving particulars as to the shares allotted, the money received, the contracts made and other matters showing the true position of the company. This report must be sent out by the directors and is called the "statutory report."

A general meeting of every company must be held at least once in every year, and not more than fifteen months may intervene between two general meetings. This is an "ordinary" general meeting.

On the requisition of the holders of not less than one-tenth of such of the paid-up capital as carries the right of voting, the directors must at any time call an "extraordinary" general meeting. The requisition must state the objects of the meeting and be signed by the requisitionists.

Unless otherwise provided by the Articles each shareholder has one vote, and one only, whatever number of shares he may hold; but the Articles often make voting powers depend on the number of shares held. The Articles also often provide for voting by proxy. A proxy is a document signed by a shareholder appointing another person to vote for him.

Resolutions.—There are three kinds of resolutions which may be passed by a company—

An " ordinary " resolution is one passed by a majority of the shareholders present at a general meeting.

An " extraordinary " resolution is one passed by a majority of not less than three-fourths of such members as vote (being entitled so to do) at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given.

A " special " resolution is one which has been passed by such majority as is required for an extraordinary resolution at a general meeting of which not less than twenty-one days' notice specifying the intention to propose the resolution as a special resolution has been duly given. Certain important steps, such as altering the Articles, can only be taken by special resolution.

Audit and Inspection.—Every company must appoint an auditor or auditors to hold office till the next annual general meeting. A director or officer of the company, or the partner or employee of such officer (except in the case of a private company), cannot be an auditor; but otherwise an auditor is not obliged to have any qualifications. Every auditor has a right of access at all times to the books and accounts of the company, and the right to demand all information required for the performance of his duties. These duties are to report to the shareholders on the accounts and on every balance-sheet laid before the company, to state whether they have obtained all the information and explanations they have required, and whether in their opinion the balance-sheet is properly drawn so as to exhibit the true state of the company's affairs.

Every company must prepare an " annual summary " and send it to the Registrar at Somerset House. This must contain a number of particulars showing the position of the company, such as the names and addresses of the members, the amount

of capital, the number of shares taken, the amount borrowed by the company on mortgage or debentures, and a balance-sheet audited by the company's auditors.

The Board of Trade has power on the application of members to appoint inspectors to investigate and report on the affairs of any company.

Contracts of Companies.—When a contract is made for a company by its agent, which is outside the scope of the memorandum, such contract is said to be *ultra vires*, and is not binding upon the company, nor can the company ratify any such contract. A company may, however, ratify a contract made by an agent outside the scope of *his* authority, provided it is one within the scope of the Memorandum of Association.

Any contract which, if made between private persons, would by law be required to be under seal, may be made on behalf of a company in writing under the common seal of the company. Any contract which, if made between private persons, would be by law required to be in writing signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any agent of the company having authority to make such contract; any contract which, if made between private persons, would be valid although made by word of mouth only, may be made by word of mouth on behalf of a company by any agent of the company having authority to make such contract; and all such contracts are binding upon the company as if the company were an individual.

Private Companies.—A private company is one which by its Articles restricts the right of its members to transfer their shares, limits the number of its members to fifty (exclusive of employees of the company and of ex-employees who were members when in the service of the company and have continued to be members after leaving the service), and prohibits any invitation to the public to subscribe for shares or debentures. Two persons are sufficient to subscribe the Memoran-

dum of Association of such a company. In the case of a private company the annual summary need not include a balance-sheet, but must be accompanied by a certificate that the public have not been invited to subscribe for shares or debentures. No statutory report is necessary, and no minimum subscription is required before allotment. Such a company is often composed of the members of one family, each being forbidden to transfer his shares except to a member of the family or with the consent of the other shareholders.

Winding up.—A company comes to an end by being wound up and dissolved. A company may be wound up (i) compulsorily, by the Court, or (ii) voluntarily, or (iii) under the supervision of the Court.

Compulsory Winding up.—A company cannot be made a bankrupt, and if it is insolvent the only way in which its property can be made available for its creditors is by winding it up, realizing its assets, and making distribution to its creditors. There are, however, other reasons for which a company may be compulsorily dissolved. A company may be wound up by the Court—

(i) if it passes a special resolution that it shall be so wound up;
(ii) if it makes default in filing the statutory report or in holding the statutory meeting;
(iii) if it does not commence business within a year of incorporation, or suspends business for a whole year;
(iv) if the number of members is reduced below seven, or in the case of a private company below two;
(v) if it is unable to pay its debts;
(vi) in any other case where the Court is of opinion that it is just and equitable that the company should be wound up.

The powers of the Court are put into operation by the presentation of a petition to the Court praying that the company may be wound up.

The company itself or any creditor may present such a petition. A contributory also may present a petition if the number of the members is reduced below seven, or if he is an original holder of his shares, or if he has held his shares for at least six months during the eighteen months before the winding up.

A " contributory " is a person liable to contribute to the assets of a company in case of winding up. Contributories are divided into two classes. The first are put on the " A " list and are those who are shareholders at the time of the winding up, but whose shares have not been fully paid for. The second class are put on the " B " list and are those who have been shareholders, but who have transferred their shares within a year of the winding up. Every person on the " B " list has some one person or more corresponding to him on the " A " list to whom his shares have been transferred. A person on the " B " list is liable to contribute to the assets of the company, if there are debts to be paid which were incurred while he was a shareholder and if the corresponding person on the " A " list is unable to pay what is owing on the shares he holds. This arrangement prevents a person from avoiding liability by transferring his shares to a pauper when he thinks the company is in difficulties.

As soon as the Court makes a winding-up order, the official receiver as provisional liquidator takes control of the company's affairs; a statement of affairs must be submitted to him; he reports to the Court as to the assets and liabilities of the company, the cause of failure and (if necessary) as to the promotion of the company and the mode in which its business has been conducted; and he summons meetings of creditors and contributories.

If at any such meeting it is resolved that a person other than the official receiver shall be appointed liquidator, the Court may appoint some other person to act in that capacity.

The duties of a liquidator resemble those of a trustee in

bankruptcy, and the rules of bankruptcy apply with regard to the rights of secured and unsecured creditors, the debts provable in the winding up, and general distribution of assets.[1]

When a winding-up order has been made, no action may be brought against the company or disposition of property made except by leave of the Court.

When the affairs of the company have been completely wound up the Court makes an order that the company be dissolved and from the date of such order it ceases to exist.

Voluntary Winding up.—For many reasons the members of a company may desire to discontinue the company and to divide its assets between them, or to give up business and settle with its creditors without the intervention of the Court. These objects may be obtained by a voluntary winding up.

A company may be wound up voluntarily when it passes a special resolution to wind up; or when it passes an extraordinary resolution that it cannot continue business because of its liabilities and that it is advisable to wind up.

There are now two forms of voluntary winding up:—(1) A member's voluntary winding up, in which the directors have made a statutory declaration that, in their opinion, the company will be able to pay its debts in full within twelve months. The company then appoint one or more liquidators, and fix their remuneration. (2) A creditors' voluntary winding up, in which no such declaration has been made. The company then summon a meeting of creditors, and lay before the meeting a full statement of the company's affairs, and the creditors may, if they wish, appoint their own liquidator. In both cases the company ceases to carry on business, except for the purpose of winding up, and its property is applied in satisfaction of its liabilities *pari passu*, any surplus being distributed among the members according to their interest in the company.

The fact that a company is being wound up voluntarily, or

[1] See *post*, pp. 92, 95–98.

under supervision (see below), does not preclude the presentation of a petition for compulsory winding up.

Winding up under Supervision.—There is a third form of winding up intermediate between the compulsory and voluntary forms, for whenever a company has resolved to wind up voluntarily the Court may make an order that the voluntary winding up shall continue, but subject to the supervision of the Court; so that the creditors, contributories and others interested may apply to the Court for directions and protection when advisable.

PART VI

BANKRUPTCY

A MAN who has not sufficient property to enable him to pay his debts is said to be insolvent. The old system of shutting up insolvent debtors in prison, merely because they could not pay, no longer exists. It is now the policy of the law to secure that the creditors of an insolvent should be treated equally, and paid their debts as far as possible out of whatever property of the debtor is available for the purpose; and also to give the debtor the chance of making a fresh start as soon as the utmost amount possible has been paid, cancelling the unpaid debts. The bankruptcy laws have been enacted to carry out this policy.[1]

Who can be made a Bankrupt.—At one time only traders could be made bankrupt, but now the distinction between traders and non-traders has been abolished An infant cannot be made a bankrupt, except, possibly, where he has incurred a debt for necessaries;[2] nor can a married woman unless she carries on a trade or business, either with her husband or on her own account. A firm cannot be made bankrupt as such, but each partner may be made bankrupt. Again, a corporation cannot be bankrupt, but its affairs may be wound up in order to enforce the rights of creditors[3] A person can only be made a bankrupt who is actually in England, or who resides or carries on business in England, or who is a member of a firm which carries on business in England, at the time when he commits an act of bankruptcy.

[1] The law is contained in the Bankruptcy Act, 1914, and Bankruptcy (Amendment) Act, 1926, which do not apply to Scotland or Ireland.

[2] See *ante*, p. 7. [3] See *ante*, p. 85.

The Petition.—Where it is required to put these laws in force the first step is the presenting of a petition to the Court to make the debtor a bankrupt. This petition may be presented either by the debtor himself or by a creditor. If it be presented by the creditor, two primary conditions must be fulfilled. (1) The debtor must be indebted to the petitioner in the sum of £50 at the least. Two or more creditors, however, may join in the petition, if the total debts due to those creditors amount to £50. (2) That the debtor has committed an act of bankruptcy within three months of the petition.

Acts of Bankruptcy.—A debtor commits an act of bankruptcy in each of the following cases: (*a*) If he assign or convey his property to a trustee for the benefit of his creditors generally. Such a private arrangement is not uncommon. It can only bind creditors who are parties to the arrangement. A deed made for the purpose of carrying out such an arrangement, and purporting to convey the debtor's property to a trustee for the benefit of his creditors, is called a "deed of arrangement." It is void unless registered in the High Court. Any creditor refusing to be a party to such an arrangement may upset it by presenting a petition, unless the other creditors pay him to get rid of him. (*b*) If the debtor makes a fraudulent conveyance, gift, or transfer of any part of his property. Fraudulent means fraudulent in respect of the creditors. (*c*) If the debtor make any conveyance or transfer of any part of his property which would be void as a fraudulent preference. This subject will be dealt with later. (*d*) If with intention to defeat or delay his creditors he departs out of England, or being out of England remains out of England, or departs from his dwelling-house or otherwise absents himself, or begins to keep house—*i. e.* to shut himself up or conceal himself. All these matters, however, depend entirely on intention. A debtor does not commit an act of bankruptcy by going to Paris for a week's holiday; this act depends upon whether the debtor commits it with the intention of avoiding his creditors.

(*e*) Where judgment has been obtained against the debtor in an action and his goods are seized to satisfy the judgment, and either sold or held by the sheriff for twenty-one days. A perfectly solvent person may have a judgment given against him for the payment of a sum of money. If so, he probably pays the money with as little delay as possible. If he does not do so his goods may be seized in execution and sold to satisfy the judgment. Allowing his goods to be so seized and sold constitutes this act of bankruptcy. (*f*) If he files in the Court a declaration that he is unable to pay his debts, or presents a petition against himself. (*g*) Where a creditor has obtained a final judgment against the debtor for a sum of money, and the debtor has not satisfied the judgment, the creditor may serve him with a formal notice requiring him to satisfy the judgment debt. If he does not obey this notice within seven days from such notice being served upon him, or satisfy the Court that he has a counter claim set off or cross demand against the creditor in excess of the amount, and which he could not have set up in the action, he has committed an act of bankruptcy. This notice is called a "bankruptcy notice," and must be in the prescribed form. (*h*) If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts.

The Receiving Order.—A copy of the creditor's petition must be served upon the debtor with a notification of the time at which it will be considered by the Court. When it comes before the Court for consideration the Court may reject the petition if not satisfied as to the necessary conditions. If so satisfied, the Court makes what is called a "receiving order." This order does not constitute the debtor a bankrupt, nor deprive him of the ownership of his property; but it deprives him of the control and possession of his property, and puts it under the direction of the Court until it is decided how it can be best dealt with for the benefit of the creditors. On the making of a receiving order an officer of the Board of Trade

called an " Official Receiver " assumes control of the debtor's property and temporarily acts as trustee for the creditors.

The Official Receiver.—It at once becomes the duty of the Official Receiver to investigate the conduct of the debtor and to report the result to the Board of Trade, and if the debtor be guilty of a criminal act to assist in his prosecution. He must manage the debtor's property and business with regard to the interests of the creditors; and so may have temporarily to arrange that the business should be carried on under his control. He must advertise the receiving order, the date of the first meeting of the creditors, and of the debtor's public examination. He must summon and preside at the first meeting of the creditors and report to them as to any proposal the debtor may have made with regard to settling his affairs.

Within seven days of the receiving order the debtor must make out and submit to the Official Receiver a sworn statement of his affairs, showing particulars of his debts and his assets and such other matters as the Official Receiver requires.

The Public Examination.—As soon as convenient after the submission of the statement of affairs the Court holds a sitting, at which the debtor is publicly examined as to his conduct, the causes of his bankruptcy, the amount of his assets, and so forth. He is bound to answer all questions which the Court may put or allow to be put to him

Meetings of Creditors.—A first meeting of creditors is summoned for an early date after the receiving order. No person is entitled to vote as a creditor unless he has duly lodged a sworn proof of his debt. A debt is provable whether it be payable immediately or at a future time, whether it is certain or contingent; but demands in the nature of damages which have not been assessed cannot be proved until they have been assessed; and debts contracted after the commencement of the bankruptcy are not provable. The debtor must attend at the first meeting and give the creditors any information they may require. The Official Receiver takes the chair and gives

the meeting all the information in his possession. Other meetings are summoned in due course as required.

Composition.—When a receiving order has been made, in the ordinary course the debtor is adjudicated a bankrupt by the Court. But he is often prepared to make a composition with his creditors. Such composition, or scheme of arrangement, is submitted to the creditors for their consideration; and if a majority in numbers and three-quarters in value of the creditors approve of it, it is submitted to the Court. The Court considers the suggested composition in the light of its possible benefit to the creditors. The Official Receiver makes a report to the Court as to the details of the proposed composition and the debtor's conduct If the debtor has been guilty of any criminal act in relation to the bankruptcy the Court cannot consent to the composition. In the case of other offences not criminal having been committed the Court will not approve of a composition that secures to the creditors less than 5*s*. in the £. Subject to these conditions the Court has discretion to allow or reject the proposed composition. It cannot take effect without the consent of the Court. If the composition is accepted and the terms of it are carried out, the debtor is released from all further claims by his creditors, except those from which a discharge in bankruptcy cannot release him.[1] If the composition having been accepted is not carried out as agreed, the Court may annul the composition and adjudge the debtor a bankrupt.

Adjudication of Bankruptcy.—If no composition be accepted the creditors may resolve that the debtor be made a bankrupt, and the Court will so adjudge him. If the creditors do not meet, or meet and pass no resolution, the Court must adjudge the debtor a bankrupt. As soon as he is adjudged a bankrupt all his property passes from him, vests in a trustee for the benefit of his creditors, and is divisible amongst the creditors. If, however, it turns out for any reason that the debtor ought

[1] See *post*, p. 100.

not to have been adjudged a bankrupt, or that his debts have been paid in full, the adjudication may be annulled. The commencement of the bankruptcy is the first act of bankruptcy within three months before the petition.

The Trustee in Bankruptcy.—The creditors may appoint any fit person to be trustee of the property of the bankrupt. They may also appoint from among themselves a committee of not more than five members, called a "committee of inspection," to supervise and assist the trustee in his duties. Sometimes the appointment of a trustee is left to this committee. Until a trustee is appointed the Official Receiver is the trustee. If no trustee is appointed by the creditors a trustee will be appointed by the Board of Trade. Any trustee, other than the Official Receiver, must give security to the satisfaction of the Board of Trade for the proper carrying out of his duties. The Board may also object to the appointment of any person on the ground of his unfitness. The duties of the trustee are principally to realize the property of the debtor, collect all moneys due to him, and generally convert into money all his estate; and then to pay all creditors *pro rata* in the order prescribed by law (see *infra*). The trustee's title is said to "relate back," *i.e.* to commence at the date of the first act of bankruptcy committed by the bankrupt within three months preceding the presentation of the petition. The object of this rule is to prevent a person who finds himself about to be made bankrupt from defeating his creditors by making away with his assets. All assets so disposed of during that period may be claimed by the trustee, but the trustee cannot claim property given by the bankrupt for valuable consideration before the receiving order to innocent third parties, *i.e.* to persons who had no notice that he had committed an available act of bankruptcy. It is often necessary for the trustee to keep the debtor's business going; for the good-will of his business may be of great value and capable of being disposed of for the benefit of the creditors. To carry on the business he

must have the permission of the committee of inspection; as he must to bring or defend actions or compromise claims. All rights of action in relation to the bankrupt's property or business pass to the trustee, who also may defend actions brought against the debtor. Purely personal actions, however, such as an action for damages for personal injury, do not concern the trustee. The trustee is remunerated in such way as the creditors determine. If the creditors are not satisfied with the trustee they may remove him at a meeting specially called for the purpose. He may also be removed by the Board of Trade on the ground of misconduct, incapacity, or failure properly to perform his duties. The trustee must keep proper books, showing all dealings with the property, and also the proceedings at meetings of creditors; and must also account to the Board of Trade for all payments and receipts.

Property divisible amongst Creditors.—Speaking generally, all property, including money, goods, land, and debts due to him, which the debtor owns at the commencement of the bankruptcy or acquires before his discharge is divisible among his creditors. But property which he holds in trust for any other person is not divisible. Neither are the tools of his trade and the necessary wearing apparel and bedding of himself and family not exceeding in all £20 in value. Also in the case of debtors who carry on any trade or business it is enacted that goods which at the commencement of the bankruptcy are in the possession, order, or disposition of the bankrupt in his trade or business may be taken by the trustee, provided the bankrupt held them with the consent and permission of the true owner, and provided he held them under such circumstances that he was the reputed owner of them. This provision is aimed at a trader obtaining credit on the strength of being the owner of property of which he is really not the owner. For example, if a shopkeeper had a large stock in his shop, under such circumstances that persons in the trade would suppose him to be the owner of the stock, this stock

could be taken by the trustee, even though in fact it did not belong to the shopkeeper, provided the true owner of the goods had allowed them to be so used by the shopkeeper. But the trustee cannot claim goods in the bankrupt's possession if there is a well-known custom in a particular trade for such goods to be hired; *i.e.* in the case of a hotel-keeper it is notorious that the furniture is usually hired; therefore the hotel-keeper cannot have obtained credit by possession of the furniture, and on his bankruptcy it will not pass to his trustee. Moreover, if the true owner demands the return of his goods before the receiving order and without notice of an act of bankruptcy, this is sufficient to prevent them from being in the bankrupt's possession with the consent of the true owner.

When a bankrupt is an officer in the Army or in the Navy, or is in the Civil Service of the Crown, the trustee receives for distribution among the creditors so much of the pay or salary of the bankrupt as the Court, with the consent of the Chief Officer of the department to which the bankrupt is attached, may direct. Where the bankrupt is otherwise in receipt of a salary or an income, or is entitled to a government pension, the Court may order such part as it thinks fit to be paid to the trustee for the benefit of the creditors.

Where any of the debtor's property is unsaleable, or is subject to charges, or is for any reason of an onerous nature, or where the bankrupt has made contracts likely to be unprofitable, the trustee may disclaim such property or contracts. If he does so any person injured by the disclaimer may prove as a creditor to the extent of his injury. It often happens that the bankrupt is a tenant, and his trustee wishes to avoid the responsibility for rent. There may, however, be an under-tenant or a mortgagee of the lease. In that case the Court has power to give the under-tenant or mortgagee the option of taking over the disclaimed lease and stepping into the place of the bankrupt—the property being vested in him on terms that will protect his interest.

Fraudulent Preference.—No insolvent person should prefer one creditor to another. If such a person pay one creditor with the intention of giving him an unfair preference or advantage over the other creditors, and if he be adjudged a bankrupt on a petition presented within three months of such payment, the payment is void and the trustee can recover the money from the creditor. To constitute a fraudulent preference the payment to a creditor must be voluntary and with the intention of preferring him. If one creditor obtain payment at the expense of others merely because he is more active than the others and puts stronger pressure upon his debtor, that is not a fraudulent preference. Neither is a payment in the ordinary course of business as a rule a case of fraudulent preference.

Voluntary Settlements.—*No man is entitled to be generous* at the expense of his creditors. Hence any settlement which a man may make on his wife or children, or other persons, or any gift which he may make to them, is improper if it has the effect of depriving his creditors of money they should have. Therefore it is provided that any such settlement or gift is void, and the trustee can recover the property, if the settler or donor become bankrupt within two years of the settlement or of the gift. It is void also if made within ten years, unless it can be proved that he was solvent when he made it. This does not apply to marriage settlements made before marriage, or to settlements made in good faith and for valuable consideration, or to settlements made on his wife or children of property which came to the settler in right of his wife.

Preferred and Deferred Creditors.—Certain creditors must be paid in full before other creditors are paid anything. Wages due to any clerk or servant by way of commission or otherwise in respect of services during four months before the receiving order not exceeding £50; wages of any labourer or workman for services rendered during two months before the receiving order not exceeding £25; amounts due under the Workmen's

Compensation Acts; contributions payable under the National Insurance Acts in respect of employed persons; and one year's rates and taxes are preferential debts. These debts rank equally among themselves.

The landlord also of the bankrupt may distrain for rent either before or after the commencement of the bankruptcy; but if he distrain after, he can only do so for six months' rent accrued due prior to the adjudication, and cannot do so for any period subsequent to the date of the distress. He may, however, prove for the balance in the bankruptcy.

Certain other debts are deferred, that is to say, are not payable until all the other creditors have been paid in full. These are debts for sums lent by a husband to his wife or by a wife to her husband for the purpose of his or her trade or business, and for sums lent to a person engaged or about to engage in business on terms of receiving a rate of interest varying with the profits, or a share of the profits, or for sums payable in respect of the sale of a goodwill, where the goodwill has been sold in consideration of a share of the profits.

Secured Creditors.—Any creditor who holds a mortgage, bill of sale, charge, or lien on the property of the debtor as a security for his debt is called a "secured creditor." The bankruptcy does not interfere with his rights against the property, but he must choose which of several courses he will take: (1) He may rest on his security and not prove for the debt at all. (2) He may realize the security, and if it is not sufficient to pay his debt he may prove for the balance with the other creditors. (3) He may put a value upon the security and prove for the deficiency. In this case, however, the trustee may redeem the security by paying the creditor the value and taking it over for the benefit of the creditors; also if the trustee be dissatisfied with the value put on the security he may compel the creditor to realize it. The creditor may also at any time call upon the trustee to elect whether he will, or will not, redeem the security, or require it to be sold. (4) The creditor may surrender his security to the trustee and prove for the

whole debt. This, of course, is only done where the security is of little or very doubtful value.

Second Bankruptcy.—A person may have a receiving order made against him, and may be adjudged bankrupt a second time, although he may have not been discharged from his first bankruptcy. In that case it is now provided that any property undistributed among the creditors in his former bankruptcy vests in his new trustee for the benefit of his new creditors, but the former trustee is deemed a creditor in the new bankruptcy for the unpaid balance of the debts provable in the former bankruptcy.

Discharge of Bankrupt.—A bankrupt may at any time apply to the Court to be discharged. On the hearing of the application the Court considers a report as to the bankrupt's conduct and affairs, and may either grant or refuse an absolute order of discharge, or may suspend the order for a certain time, or may grant it subject to certain conditions. If the debtor is shown to have committed a criminal act in regard to his bankruptcy, or if any of certain facts mentioned below are proved, the Court may adopt one of four courses, namely either (1) refuse the discharge; or (2) suspend it for such period as the Court thinks fit; or (3) suspend it until 10*s.* in the £ has been paid to the creditors, or (4) require the bankrupt to consent to judgment being entered against him for the balance or part of the balance of the debts not satisfied at the date of the discharge, such sum to be paid out of his future earnings, or out of future acquired property in such manner as the Court may direct.

Among the facts referred to above are: failure to pay 10*s.* in the £ unless the circumstances show that the debtor was not justly to blame; omission to keep proper business books; continuing to trade after knowing himself to be insolvent; contracting debts which he could not reasonably have hoped to pay; not satisfactorily accounting for any loss of assets; having brought on his bankruptcy by rash and hazardous speculations, or by unjustifiable extravagance in living, or by

gambling, or by culpable neglect of business; defending actions unreasonably, or incurring unjustifiable expense in bringing frivolous actions, thereby contributing to his bankruptcy; giving undue preference to creditors; incurring liabilities within three months of the receiving order with a view of making his assets equal to 10*s.* in the £; having previously been bankrupt or compounded with creditors; having committed any fraud.

Amongst criminal offences by a debtor in a bankruptcy may be mentioned : fraudulently concealing any part of his property to the value of £10 or upwards ; fraudulently removing property of the value of £10 or upwards; fraudulently concealing any debt due to or from him ; material omissions in his statement of affairs ; destruction or falsification of his books ; obtaining property on credit by fraud within six months before the petition which he has not paid for ; failing to keep or preserve proper books of account during any part of the two years before the petition in which he was engaged in trade or business, or during any further period in which he was so engaged between the presentation of the petition and the receiving order ; contributing to insolvency by gambling or hazardous speculation outside his business when he is in trade or business ; obtaining credit after adjudication to the extent of £10 or upwards from any person without informing him that he is an undischarged bankrupt ; engaging in any trade or business under another name without disclosing to all persons dealing with him the name under which he was made bankrupt.

Effect of Discharge.—A discharge in bankruptcy releases the debtor from all his debts and liabilities, except from any liability under a judgment against him in an action for seduction, or in any matrimonial suit, or under an affiliation order ; or from any debt or liability incurred by fraud ; or from certain debts due to the Crown. A discharge has no effect on the liability of a person who is surety for the bankrupt or who is jointly liable with the bankrupt on any contract.

PART VII

BILLS OF SALE

WHEN a man is approaching insolvency and has no more money left he is often driven to realize money by dealing with his goods. He may of course sell his goods outright; but this generally means parting with the possession of them, and it may be extremely inconvenient for him to part with the possession of his household furniture, or with the machinery in his factory, or with the cattle on his farm. Again, he may pledge his goods; but this proceeding is open to the same objection, for it entails losing the use and enjoyment of the goods. A pledge (or pawn) is a contract by which the owner of goods hands the goods over to a person who lends him money on the security of the goods and holds the goods till he is repaid. The borrower, however, continues to be the owner.

Clearly what the man in difficulty wants is some way of raising money upon his goods while remaining in possession of them. This may be done in either of two ways: (1) he may sell the goods and make an arrangement with the buyer by which he is to have the use of the goods; or (2) he may mortgage the goods. A mortgage is a contract by which an owner borrows money upon the security of his property by conveying the ownership of that property to the lender on condition that the owner is to remain in possession of the property until he makes default in carrying out the terms of the contract, and that the lender shall re-convey the property to him on repayment of the loan. Either of these two ways of raising money on goods may be carried out by means of a contract contained in a deed called a "Bill of Sale."

There are therefore two kinds of bills of sale: One an *absolute* bill of sale, by which the goods are sold absolutely to the buyer, though the seller is allowed for a consideration to remain for a time in possession of them. The other is a *conditional* bill of sale by which the goods are mortgaged. The person who gives a bill of sale is called the grantor, and the person to whom it is given (*i.e.* the person who finds the money) is called the grantee.

Bills of sale of either kind are liable to grave abuses. In the first place, if a man be allowed to part with the ownership of his goods secretly while still remaining in possession of them, he may get credit on the reputation of being their owner, and his creditors may be defrauded. In the second place, persons who borrow money on the security of their goods (which often it is ruin entirely to part with) are easy victims of unscrupulous and oppressive money-lenders. To meet these abuses the Bills of Sale Act, 1878, and the Bills of Sale Act Amendment Act, 1882, were passed.

Absolute Bills of Sale.—Any bill of sale of this kind is void and deemed to be fraudulent as against the trustee in bankruptcy or the creditor of the grantor or as against any person seizing his goods in execution of any process of any court, unless it fulfils certain requisites. These are: (1) that the deed shall be attested by a solicitor who must certify in the attestation that the effect of the deed was explained to the grantor before execution; (2) that the bill of sale must truly state the consideration for which it was given; and (3) that it must be registered in the High Court within seven days after it is made. Registration must be renewed every five years.

Conditional Bills of Sale.—These are the bills of sale usually met with. Every bill of sale given by way of security for the payment of money must be in a prescribed form, or it is absolutely void. This form is a deed in which must be stated the date, the names and addresses of the parties, the consideration

for the bill of sale, the rate of interest on the loan, the terms agreed upon as to repayment, and as to the grantor protecting the goods against seizure for rent, fire, etc. The bill of sale is also absolutely void unless it fulfils the following requisites: (1) it must be attested by one or more credible witnesses; (2) it must truly state the consideration for which it is given; (3) the consideration must not be less than £30; and (4) it must be registered in the High Court within seven days after it was made. It must also have a schedule attached to it containing an inventory of all the goods comprised in the bill of sale; and it is only goods which are so specifically described in the schedule that are protected by the bill of sale against the creditors of the grantor, or against his trustee in bankruptcy, or against anyone else interested except the grantor himself. It is also void, except as against the grantor, in respect of any goods which are specifically described, unless the grantor was the true owner of these goods at the time the bill of sale was made.

On repayment of the money lent in the manner agreed the grantor is entitled to have the ownership of his goods reconveyed to him. A memorandum of satisfaction may then be entered in the register and written upon the registered copy of the bill of sale.

If the grantor does not observe the terms of his agreement the goods may be seized and taken away by the grantee. But the grantee may not seize the goods for any other than the following causes: (1) If the grantor makes default in payment of interest or principal, or in the performance of any part of the agreement for protecting the goods; (2) if the grantor becomes bankrupt, or if the goods are seized for rent, rates or taxes; (3) if the grantor fraudulently removes the goods from the premises; (4) if the grantor fails without reasonable excuse to produce on demand in writing his last receipts for rent, rates and taxes; and (5) if the goods are seized in execution under a process of law.

The Register of Bills of Sale is open to the public, and anyone may examine it on paying a small fee.

A bill of sale, if it satisfies the prescribed requirements, protects the goods against being taken by or on behalf of the creditors of the grantor. It is, however, no protection against the goods being taken for rent, rates and taxes. Although the grantee may seize the goods on the bankruptcy of the grantor, yet, upon adjudication, the bankruptcy is deemed to relate back to and commence at an earlier date,[1] with the result that the goods will have been in the bankrupt's order and disposition[2] at the commencement of the bankruptcy, even though he has not yet been in fact adjudicated, and, therefore, the grantee has not yet had ground for seizing them. In such case, if the bill is a conditional bill the title of the trustee in bankruptcy overrides that of the grantee, but if the bill is an absolute one the grantee's title is made good by a special provision of the Act of 1878.

[1] See *ante*, p. 94. [2] See *ante*, p. 95.

PART VIII

SALE OF GOODS[1]

A CONTRACT of sale of goods is one by which the seller transfers or agrees to transfer the ownership of goods to the buyer in consideration of a payment in money. The money consideration is called the price. An agreement to transfer the ownership of goods in exchange for other goods is not sale but barter. The transfer of the ownership of goods without consideration is gift. The simple promise of a gift of goods not accompanied by delivery of the goods is not binding for want of consideration, and a mere intention to make a gift is ineffectual. A gift accompanied by physical delivery of the goods is effectual, and transfers the ownership; and a gift by deed without delivery is also effectual.

The price is usually fixed by the contract, but it may be left to be fixed by the valuation of a third party, or in some other agreed way. When the price is left to be fixed by a third party, and he fails to make any valuation, the agreement is made void; but if in these circumstances the buyer has actually received the goods he must pay a reasonable price for them. When there is no agreement as to price the buyer must pay a reasonable price for the goods. It is always a question of fact depending on the circumstances of each case what is a reasonable price.

When by the agreement between them the ownership of the goods is immediately transferred from the seller to the buyer the contract is called a sale; but when the transfer of the

[1] The law stated in this Part is almost entirely contained in the Sale of Goods Act 1893, which forms a code of the law on the subject.

ownership is to take place at a future time, or subject to some condition to be subsequently fulfilled, the contract is called an "agreement to sell." An agreement to sell becomes a sale when the time has elapsed, or when the condition has been fulfilled. The word "goods" means all tangible movable property except money. It includes growing crops, provided the crops are such as are planted and gathered in the year, as wheat or potatoes; and also things attached to the land, as trees, which are agreed to be severed before sale and under the contract of sale.[1] Shares in a company are not goods; a share being merely an intangible right to participate in the profits of the company. If the goods are clearly identified and agreed upon at the time of the contract they are called "specific goods." If the seller has to manufacture the goods or to acquire them, they are called "future goods."

If a contract be made for the sale of specific goods, and at the time, without the seller's knowledge, the goods have perished, the contract is void. And when there is an agreement to sell specific goods, and subsequently without any fault on the part of either buyer or seller the goods perish before the risk passes to the buyer, the agreement becomes void.

FORMATION OF CONTRACT

By the common law a contract of sale may be made by writing or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.[2] But it is provided by the Sale of Goods Act, 1893, that a contract for the sale of any goods of the value of £10 or upwards shall not be enforceable by action, unless the buyer shall accept part of the goods so sold, and actually receive the

[1] Growing trees are part of the land and are not goods. Therefore a contract to sell growing trees, which are not to be cut down under the terms of the contract, is not a contract for the sale of goods. See *ante*, p. 23.

[2] This sentence states the law in Scotland whatever be the value or price of the goods. Nothing else in this subsection applies to Scotland.

same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged, or his agent in that behalf. The value is determined by the agreed price, and value and price for the purpose of this provision are the same. It will be seen that a contract for the sale of goods of the value of £10 or upwards differs from the five contracts dealt with by Section 4 of the Statute of Frauds [1] as to the conditions under which it is binding in an important respect. None of those five contracts is enforceable unless it is in writing; the contract for the sale of goods is enforceable in any one of three sets of circumstances: (1) when the buyer accepts and receives the goods or some of them; (2) when the buyer makes any payment in respect of the purchase of the goods, or gives anything to the seller to bind the bargain; or (3) where a note or memorandum of the contract is made in writing, and signed by the party against whom it is desired to enforce the contract. Therefore no written contract need be proved where either (1) or (2) can be proved.

Acceptance and Receipt.—The contract is binding in the first place, whenever, having verbally made an agreement to buy goods for £10 or upwards, the buyer accepts and receives the goods or some of them. "Accept" here has a peculiar meaning, and is used in a sense different from that in which it is generally used in reference to the sale of goods. There is an acceptance within that peculiar meaning when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale; *i.e.* does any act in relation to the goods which he would not do unless he recognized the fact that he had made a contract to buy the goods. Thus, Abbott verbally agreed with Wolsey to sell him twenty tons of hay according to a sample, a barge with the hay to be alongside Wolsey's wharf by 21st July. The barge was not alongside Wolsey's wharf by the 21st, and on 4th August Abbott sent a

[1] See *ante*, p. 16.

message to Wolsey asking whether he would accept the hay. Wolsey answered that he would if the barge was alongside his wharf by 8th August. The barge was alongside that day, and Wolsey went on board, took a sample of the hay, and after examining it said, "The hay is not to my sample, and I shall not have it." It was held that Wolsey's act in taking the sample, to see whether it corresponded with the other sample by which he had agreed to buy, was an act which recognized a pre-existing contract. Therefore there had been an "acceptance" sufficient to enable Abbott to bring an action on the contract, *i.e.* sufficient to make it unnecessary for Abbott to produce a contract in writing signed by Wolsey.[1] It must be noticed that in this case there was clearly no acceptance in the ordinary sense of the word which implies a consent to receive. The acceptance which prevents a buyer from asserting that a contract is not binding against him for want of writing does not in any way prevent him from asserting that the goods are not in accordance with his contract, and on that account rejecting them. Again, when a person having verbally agreed to buy goods for over £10, endeavoured to re-sell the goods, his act in trying to re-sell was an act which he would not have done unless he recognized that he had a right to sell them, or, in other words, that he had previously made a contract to buy them; therefore his act amounted to an acceptance sufficient to make it unnecessary for the seller to produce a writing signed by the buyer in order to have a right to bring an action against the buyer. It is to be noticed that acceptance of a portion of the goods has the same effect as acceptance of the whole. Acceptance alone, however, is not sufficient; the buyer must also have actually received the goods. There is an actual receipt when the goods, or documents of title to the goods,[2] are delivered to the buyer, or to any agent for him; or when the goods are delivered to a carrier for transport to the buyer. Whenever the goods are placed at the disposal of the

[1] *Abbott* v. *Wolsey* (1895), 2 Q. B. 97.

[2] See *post*, p. 133.

buyer, so that the seller has no longer a lien upon them for the price, they have been received by the buyer. Also when the seller has by agreement with the buyer become merely the bailee or custodian of the goods for the buyer, there has been a receipt, although (as will be seen later [1]) the seller in such circumstances may still retain his lien. Provided there is both acceptance and actual receipt, the acceptance may take place before, after, or at the same time as the receipt. Both acceptance and receipt may be entirely constructive. This is so when the seller by agreement with the buyer retains possession of the goods on behalf of the buyer or his agent. For example: Elmore was a dealer in horses and also kept a livery stable. He had a pair of horses for sale which he offered to Stone for a certain price. Stone sent Elmore a verbal message that he would buy the horses, but that Elmore must keep them at livery for him, as he had at the time no stable or groom. On receipt of this message Elmore moved the horses from what he called his sale stable to his livery stable. Stone subsequently refused to pay for the horses, and Elmore brought an action against him for the price. Stone's defence to the action was that he had signed no contract in writing, nor done anything else to make a contract binding upon him. It was decided, however, that from the time of the removal of the horses Elmore held the horses not as owner but merely as Stone's agent or bailee, as any other livery stable-keeper might have done, and that the circumstances amounted in law to a sufficient acceptance and receipt to make it unnecessary for Elmore to prove a contract in writing signed by Stone [2]

Payment.—In the second place, a verbal contract for the sale of goods of the value of £10 or more is enforceable if the buyer has paid any part of the price, or given anything to the seller by way of earnest to bind the bargain. To satisfy this requirement some money must have actually passed from the buyer to the seller, or some token must have actually been

[1] See *post*, p. 127. [2] *Elmore* v. *Stone*, 1 Taunt. 458.

handed by the buyer to the seller with the object of creating a binding obligation between them.

Therefore, if the buyer agree that a sum of money due to him from the seller shall be set off against the price of the goods there has been no part payment nor has anything been given which binds the bargain. But if the buyer on verbally agreeing to buy the goods were to hand the ring from his finger to the seller, for the seller to hold till the price was paid, there would be no need to prove any contract in writing.

Writing.—It is only where neither of the two foregoing sets of circumstances exists that it is necessary to prove a contract in writing, signed by the party against whom it is desired to enforce it. It is, however, obviously advisable that every agreement for the sale of goods for a considerable price should be in writing. To satisfy the law the writing must satisfy the requirements explained before when considering the five contracts mentioned in Section 4 of the Statute of Frauds.[1] Therefore all particulars necessary to prove the transaction must appear in the writing. Such particulars are, however, very simple; the requirements of the law are satisfied if the writing contain the name or a sufficient description of the seller, and also of the buyer; a sufficient description of the goods; and the price. These particulars may be contained in one document, or in several connected documents. The writing need not be signed by both parties, provided both are named and described. But if either party brings an action against the other on the contract, the plaintiff must produce a written contract signed by the defendant or his agent.

It often happens that a buyer agrees to buy a number of things, no one of which is of the value of £10, but the total price of the things exceeds £10. In such a case it is not always easy to say whether the foregoing rules apply or not. If the purchase of each thing was a separate transaction, then each transaction is a distinct contract, and these rules have no

[1] See *ante*, p. 16.

application. But if the purchase of the things was one transaction, then the rules apply. Whether there is one transaction or more is a question of fact to be determined on the circumstances of each case. For example: Parker went to Baldey's shop and selected a large number of articles which he agreed to buy. The price of no single article amounted to £10, but the total bill came to £70. The goods were to be sent to Parker by the shopkeeper. When the goods were sent to him Parker refused to accept them, because Baldey refused to allow him the discount for cash which he demanded. Baldey accordingly sued Parker for breach of contract, and was met by the defence that an action could not be brought, as the goods had not been accepted, nor had anything been paid for them, nor was there any written memorandum of the sale signed by Parker. This defence was successful, as it was held that it was all one transaction, and whenever the contract either at the commencement or the conclusion amounts to or exceeds the value of £10, it does not bind unless the rules are complied with.[1]

Again, the contract may be for the sale of goods, but also for the exercise of skill and labour. If the real contract is for the sale of a chattel, as where a tailor makes a suit, the Act applies, but if the real contract is for skill and labour, and the goods supplied are only ancillary, the Act has no application. Thus, a solicitor who prepares a deed is really contracting for skill and labour, though he also supplies parchment and ink as something ancillary to the contract.

The rules apply equally whether the goods which are the subject of the contract are in existence at the time of the contract or not; whether they are ready to be delivered or whether something has to be done to them to make them fit for delivery; whether they are to be delivered at once or at a future time. Thus, the rules apply to a contract to buy a motor-car for £500 to be specially built for the buyer. When

[1] *Baldey* v. *Parker*, 2 B. and C. 37.

built to his order, if he refuse to accept the car no action can be successfully brought against him if neither acceptance nor payment can be proved, unless a written memorandum of the contract signed by him can be produced.

It must be remembered that the foregoing rules only apply to contracts for the sale of goods of the value of £10 or upwards, and that they are only rules as to the mode of proof of the contract. The agreement itself may (as has been said) be expressed in any way.

TRANSFER OF OWNERSHIP

Where there is a contract for the sale of specific goods which are in a state to be immediately delivered, the ownership of the goods passes from the seller to the buyer as soon as the contract is made, unless there is any contrary intention. The contract is complete as soon as the price has been agreed. A contrary intention may be expressed, or may be implied from the conduct of the parties, or from the circumstances of the case. The fact that the time for payment or the time of delivery is postponed is no evidence of any contrary intention. Thus, when A and B in writing agree that A shall sell and B shall buy for the sum of £50 a horse standing in A's stable, as soon as the agreement is made the horse becomes the property of B, if nothing happens to show that it is the intention that the ownership shall not pass to B until some condition is fulfilled.

When the contract is for the sale of specific goods, which are not ready for delivery, but to which the seller has to do something in order to make them ready for delivery, the ownership does not pass to the buyer until the seller has done that which is necessary, and the buyer has notice that it is done. For example, when there is an agreement to buy a carriage which is to be painted by the seller before delivery, the buyer does not become the owner of the carriage until the painting has

been done and he has notice of the fact. Again, when by the terms of the contract the seller has to convey the goods to the house of the buyer, the goods are not ready for delivery until they have been carried to the buyer's house, and therefore the ownership of the goods does not pass to the buyer until they have been so carried.

When there is a contract for the sale of specific goods which are in a state fit to be delivered, but it is necessary, in order to ascertain the price, for the seller to weigh, measure, test or to do some other thing to the goods, the ownership of the goods does not pass to the buyer until that thing has been done, and the buyer has notice of the fact. For example, when there is a contract to sell all the wheat loaded upon a certain ship at 30*s*. a quarter, the wheat remains the property of the seller until the wheat has been weighed and the buyer has notice of the result of the weighing As soon as the buyer has this notice he is the owner Again, when there is a contract to sell a quantity of whisky at a price depending on the amount of alcohol in the liquor, the whisky does not become the property of the buyer until it has been tested, and he has notice of the result.

Goods are often sent to a person on approval, or on trial, or on "sale or return" In this case the goods become the property of the buyer when he signifies his approval or acceptance, or deals with the goods in a manner which shows an intention of accepting them. If he keep the goods beyond the time fixed for the return of the goods, or beyond a reasonable time if no such time is fixed, the ownership of the goods has passed to the buyer, and he cannot return them. It must in all cases depend on circumstances what is a reasonable time. In many trades rules as to the return of goods sent by wholesale traders to retailers on sale or return are well established, and any transaction between such persons will be subject to such rules. Sometimes it is the rule that the ownership passes to the buyer on delivery, but that if he chooses to return them

within a certain time he has a right to do so, and on his exercising such right the ownership reverts to the seller.

When there is a contract for the sale of future goods by description, the ownership of such goods does not pass to the buyer until goods answering the description and fit for delivery have been set aside or appropriated to the contract, and both buyer and seller have assented to the appropriation. Delivering goods to a railway company, or other carrier, in pursuance of the contract, is an appropriation of the goods by the seller, unless he reserve a right of disposal. He reserves such right when, by the terms of the contract, the buyer is not to become the owner until some condition has been fulfilled. For example, it may be agreed that the goods are not to become the property of the buyer unless he accept a bill of exchange for the price; in such a case delivery to a carrier, or even to the buyer himself, would not make the buyer the owner of the goods.

It must always be remembered that the general principle is that the ownership passes when it is intended to pass, and that any rule is subject to this principle, and liable to be displaced by proof of an intention not in accordance with the rule.

Risk.—The great importance of fixing the time at which the buyer became the owner of the goods lies in the principle that, as a general rule, the goods are at any time at the risk of the person who is then the owner. It is generally immaterial who has possession of the goods. For example, Baxter had a stack of hay standing on his land which he agreed in writing on 4th January to sell to Tarling for £145. By the terms of the agreement the hay was to be paid for on 4th February, and was not to be removed till paid for. On 20th January the hay was destroyed by an accidental fire. It was decided that, as there was nothing for Baxter to do to the hay, Tarling had by the agreement become the owner of it, although nothing had been paid and the hay never left Baxter's premises; therefore it was Tarling's hay which had been burnt, and he was bound

to pay the £145 as agreed.[1] Again, the risk is often not a physical one, but arising from a danger of quite a different character. When the trustee of a bankrupt takes possession of the bankrupt's property for the benefit of the creditors, he takes any goods of which the bankrupt is the owner. It may be that among these are goods which have never been paid for. In such a case the unpaid seller will only receive out of the bankrupt's estate a dividend along with other creditors, and has no right to the goods. Or the trustee may take possession of goods which have been paid for but have not yet become the property of the buyer. For example, Morrice, a timber merchant, agreed to buy the trunks of certain trees from one Swift, on whose land the felled trees were lying, and actually paid the price. By the agreement Swift was to trim and cut off the tops of the trees, and convey the trunks to Morrice's yard. Before Swift had severed the parts of the trees which had been bought he was made a bankrupt Immediately Morrice heard of this he sent men and carts to Swift's premises, who cut and carried off the trunks that had been paid for. It was held that Morrice had no right to do this, for the trunks had not become his property; the contract being for the sale of specific goods, not ready for delivery, to which the seller had to do something to make them ready for delivery, and the ownership of which, therefore, did not pass to the buyer till the seller had done what he had to do.[2] But when delivery of goods is delayed by the fault of either the buyer or the seller, the goods are at the risk of the party in fault, as regards any loss which might not have occurred but for such default.

When the seller retains the custody of goods, the ownership of which has passed to the buyer, the seller is bound to take good care of the goods; and the buyer, if he take possession before becoming the owner, must take good care of the goods. Either is answerable for loss by his negligence.

[1] *Tarling* v. *Baxter*, 6 B. and C. 360.
[2] *Acraman* v. *Morrice*, 19 L. J. C. P. 57.

SALE BY PERSONS OTHER THAN OWNERS

As a general rule a buyer does not acquire a good title to the goods—that is to say, does not become the owner of them—unless the seller was the owner of the goods, or acting under the owner's authority. Thus, if A without B's authority sell B's goods to C, C does not in general acquire a good title to the goods, and B can recover his goods from C. There are, however, exceptions to this rule, for example, a landlord may levy a distress by seizing the goods of his tenant for overdue rent, and may sell the goods, and the buyer may acquire a good title. Also, when a person buys goods in "market overt" he acquires a good title to the goods, if he buy them in good faith and without notice that the seller has no right to sell.[1] "Market overt" means a regular and authorized market held in a certain place on certain fixed days. The term includes every shop in the city of London, so far as regards the sale in that shop of goods displayed there for sale in the ordinary course of the business. Horses are an exception to the general rule; and the buyer of a horse in market overt does not acquire a good title to the horse if the seller's title be defective, unless certain formalities are complied with. From the general rule it follows that, if a thief sell the stolen goods to an innocent buyer in market overt, the buyer acquires a good title to the goods, and the real owner cannot recover them from him. But if the thief be caught and prosecuted and convicted, the owner has a right to recover them from any one who has them, even though he bought them in market overt.

When a seller, who retains possession of goods the ownership of which has passed to the buyer, sells them to a second buyer, this second buyer acquires a good title to the goods if he actually receives possession of them in good faith and without notice of the first sale. So where a person who has bought, or agreed to buy, goods is allowed to take possession of the

[1] The rules as to sale in market overt do not apply to Scotland.

goods before becoming the owner, any sale he may make gives a good title to one who buys in good faith. Again, a person who has only a voidable title to goods, but who sells them before that title is avoided, gives a good title to one who buys in good faith.

A mercantile agent (*i.e.* one who in the usual course of his business has authority to buy, sell or pledge goods) can give a good title to the goods in his possession even though his principal has forbidden him to sell them, unless indeed the purchaser acts in bad faith, knowing that the agent has no authority to sell.

CONDITIONS AND WARRANTIES[1]

A "condition" in a contract for the sale of goods is a material term or provision of the contract, the failure to observe which by one party entitles the other to treat the contract as repudiated, frees him from his obligation under it, and usually gives him a right of action for breach of contract against the party in fault. Thus when there is a contract to sell a quantity of "English wheat," it is a condition of the contract that the wheat to be delivered to the buyer shall be English, and if some other sort of wheat is delivered, a condition of the contract is broken by the seller, the buyer may reject the goods and may sue the seller for damages for breach of the contract. Again, where a contract is made to sell 50 tons of pig iron "to be delivered on board the ship *Cleopatra* at Victoria Docks on or before 15th March," it is a condition of the contract that the iron shall be delivered at the time agreed. If the iron be not delivered in time, the buyer will probably have a right to reject it altogether and to bring an action for damages for

[1] In Scotland there is no distinction between a warranty and a condition, and the right of rejection is more extensive than in England or Ireland. Failure by the seller to perform any material part of the contract is, in Scotland, a breach of contract, which entitles the buyer at his option either to reject the goods (provided he does so within a reasonable time) or to sue for damages.

breach of the contract. It must be noticed that although a failure to deliver goods punctually at the time agreed is usually a breach of contract for which an action may be brought, failure to pay the price punctually at the time agreed is not usually such a breach. A buyer can often refuse to accept the goods and sue for damages because of delay in delivering, but the seller cannot usually refuse to accept money and sue for damages because of delay in payment. In either case, however, a different intention may appear from the contract, and very often punctual delivery is not an essential part of the contract.

A "warranty" is an agreement with reference to the goods sold, which is not part of the main purpose of the contract of sale, but collateral to it. A breach of warranty by the seller does not entitle the buyer to reject or return the goods, but does give him a right to damages A warranty is most frequently an undertaking that the goods have some quality. Such undertaking is given by the seller in consideration of the buyer agreeing to buy, and to induce him to buy. A warranty is very different from a mere representation as to the quality of the goods A representation or statement as to the goods, even if untrue, has no effect upon the contract unless it amount to fraud. If it amount to fraud the contract is voidable. A warranty, however, in no way depends upon honesty or knowledge or belief; for if a seller warrant his goods to have a certain quality he undertakes that they have that quality, whether he believes them to have the quality or not; and if they have not got the quality, the seller will have to pay compensation to the buyer on that account quite irrespective of any question of fraud. The buyer has, however, no right to return or reject the goods because they are not of the warranted quality. For example, A sells a horse to B for £75, and warrants the horse to be sound. It turns out that the horse is not sound. B has no right to demand his money back and return the horse. He has, however, a right to damages against

A for his breach of warranty; and if he promptly re-sell the horse and get only £25 for it, he has a right to recover the difference between the price he paid for a sound horse and the amount he got by the sale of an unsound horse, *i.e.* £50.

Whether a stipulation is a condition of the contract or a warranty depends on the interpretation of the contract; and on such interpretation it depends whether a breach of the stipulation gives the buyer the right to reject the goods and treat the contract as repudiated, or whether he has merely a claim for damages for the breach. Although, when a seller fails to fulfil a condition of the contract, the buyer has a right to assume that the seller has repudiated the contract, the buyer may if he choose waive the condition, or he may treat the breach of the condition as a breach of warranty. But when once the buyer has accepted the goods, or when the ownership of specific goods has passed to him, he has no choice, and can only treat a breach of condition as a breach of warranty, unless it be part of the contract that he may return or reject the goods.

Implied Conditions and Warranties.—A condition or warranty is said to be implied when it is not expressed in words, but is tacitly understood and is binding upon the parties by law unless they express any inconsistent intention.

Unless it be otherwise agreed, or there are circumstances showing a different intention, there is an implied condition that the seller has a right to sell. There is also an implied warranty by the seller that no one has any right to interfere with the buyer's quiet possession of the goods, or has any right over the goods which can be enforced against the buyer. Although in nearly every case a seller is considered in law as giving an implied undertaking that he has an absolute right to pass the ownership of the goods to the buyer, there may be circumstances in which such an undertaking is not necessarily implied. Thus although a shopkeeper as a rule gives such an undertaking, a pawnbroker who sells an article which is described as an

unredeemed pledge does not give such an undertaking, for the manner in which the article came into the possession of the seller is often such that the seller cannot know whether the pawner had any right to it.[1]

There is always an implied condition that goods which are sold by description shall correspond with the description. Clearly, if goods are delivered which do not correspond with the description they are not the goods bargained for, and the buyer can reject them. For example, an agreement to sell by description an oak table would not be fulfilled by the delivery of a mahogany table And if the sale be by sample as well as by description, the goods must correspond with the description as well as with the sample Thus if a contract be made to sell a quantity of "brandy equal in quality to sample," and spirits are delivered which are not in fact brandy, though they are equal in quality to the sample, the seller has committed a breach of contract

As a general rule a buyer is left to exercise his own judgment as to the quality of goods he buys, and as to their fitness for the purpose for which he requires them There is generally no implied warranty as to quality or fitness, and the maxim *caveat emptor* (which may be translated, "let every buyer look after himself") applies. Therefore the seller of a thing is in general under no legal liability if he keep silence and allow the buyer to buy a thing which the seller knows has not got the qualities which the buyer thinks it possesses. If the seller does not in any way deceive the buyer or give any warranty or undertaking as to the thing, he is not responsible if the buyer deceive himself or is entirely mistaken as to the thing. There are, however, exceptions to the general rule. Thus when a buyer either expressly or by implication makes known to the seller the particular purpose for which he requires the goods, so as to show that he relies on the seller's skill and judgment, and the goods are of a kind which it is the seller's business to supply, there

[1] *Morley* v. *Attenborough*, 3 Exch. 500.

is an implied condition that the goods shall be reasonably fit for the purpose. This rule applies equally whether the seller be himself the manufacturer of the goods or not. Thus, if a man buy a clock from a person who sells clocks in the ordinary course of his business, the seller is clearly informed of the purpose for which the thing is required from the mere circumstances, and the ordinary buyer of a clock obviously must rely to a large extent on the judgment of the seller. Hence the seller is considered in law to have given an undertaking that the clock is reasonably fit for its purpose, *i e.* that it will go and keep reasonable time And if it will not go and keep reasonable time, the seller has broken a condition of the contract of sale, and is liable to an action for damages for breach of that condition. It must always be a question of fact, whether or not the thing is reasonably fit for the purpose for which it was sold. But if a person buy a clock at an auction sale being held in the house of a deceased person, there is no implied condition or warranty that the clock will go, for the clock is not bought from a person whose business it is to sell clocks, and the buyer must look out for himself. Again, if a retailer of clocks buy a clock to sell again from a manufacturer of clocks, probably the retailer buys on his own judgment as an expert in clocks, and does not rely on the judgment of the seller. In such circumstances there may be no implied condition of fitness When an article is sold under a patent or trade name (as Pears' Soap), there is no implied condition by the retailer as to its fitness for any purpose; but there is an implied warranty that every mark, or trade-mark, or trade description applied to goods is a genuine mark and not a forgery.[1]

When goods are sold by description by a person who deals in such goods, there is an implied condition on his part that the goods shall be of merchantable quality, *i.e.* that they shall be of such quality as to be capable of being re-sold in the

[1] The Merchandise Marks Act, 1887, s. 17. See *post*, p 233,

market under the description. Thus, where a merchant agrees to buy from a cloth manufacturer a quantity of an article known in the trade as "indigo blue cloth," it is an implied condition of the contract that the merchant shall be able to deal with the goods on the market as "indigo blue cloth." [1] But if the buyer has examined the goods there is no implied condition with regard to any defect which such examination ought to reveal to the buyer; and if he resells the goods without examining them he loses his right to reject them.

It must be noticed that an implied warranty or condition may be part of a contract even when there are express warranties or conditions, provided the implied are not inconsistent with the expressed. Also, the usage of a particular trade may cause certain conditions to be implied.

Sale by Sample.—Where goods are sold by sample there is an implied condition that the bulk of the goods shall correspond in quality with the sample, and that the buyer shall have a reasonable opportunity of comparing the bulk with the sample. There is also an implied condition that the goods shall not have any defect, rendering them unmerchantable, which is not apparent on an ordinary reasonable examination of the sample. Thus, if whisky were sold by sample which had been coloured with some tasteless stuff which rendered the whisky unwholesome, such defect could not be discovered by the ordinary means of testing, *i.e.* by taste. This defect would be a breach of contract.

PERFORMANCE OF THE CONTRACT

Delivery of the goods and payment of the price are concurrent conditions unless otherwise agreed The seller must be ready and willing to give possession of the goods to the buyer in exchange for the price; the buyer must be ready and willing to pay the price in exchange for possession of the

[1] *Jones* v. *Padgett*, 24 Q. B. D. 650.

goods. It is, however, very common for an agreement to be made inconsistent with this general rule. Thus, in the case of an agreement to sell goods on credit, the seller must deliver the goods at once (or at the time agreed) without payment, and the buyer usually becomes the owner before payment.

Place of Delivery.—The place of delivery of goods sold is the seller's place of business or house, unless there be any agreement to the contrary. But if the contract be for the sale of specific goods, which are to the knowledge of both parties in some other place, that place is the place of delivery. And when at the time of sale the goods are in the possession of a third person, there is no delivery to the buyer until such person admits that he holds the goods for the buyer. It is, however, a condition in very many contracts that the seller shall send the goods to the buyer or deliver them at the buyer's house or place of business. This condition may be express or implied, and is often implied merely from the nature of the transaction, or from the usual course of business between the parties. For example, when a householder in London agrees to buy five tons of house coal from a coal merchant, perhaps nothing is said as to the place of delivery; but none the less it is a condition of the contract that the coal merchant shall deliver the coal at the buyer's house; for that is the almost universal usage, and the nature of the transaction is sufficient to show what the intention was.

Time of Delivery.—If the seller undertake to send the goods to the buyer and no time is fixed for sending them, he must send them within a reasonable time. What is a reasonable time must depend on the circumstances of the case, as, *e.g.*, the nature of the goods, whether the seller has to do anything to the goods to fit them for delivery, the distance they have to be carried, etc. The expense of making goods fit for delivery must be borne by the seller unless otherwise agreed. Delivery must be made at a reasonable hour, and the same applies to a demand for delivery by the buyer. For example, a seller who

has to deliver the goods at a private residence is not entitled to ring the bell at two o'clock in the morning and require the buyer to get out of bed and take the goods in. The refusal of the buyer in such circumstances could not be a refusal to accept delivery, nor in case of such refusal can the seller claim to have tendered delivery.

Mode of Delivery.—The seller is bound to deliver to the buyer the quantity of the goods which he contracted to sell. If he deliver less than the agreed quantity the buyer may reject them; but if he accept them he must pay for them at the agreed rate. If the seller deliver more than the agreed quantity, the buyer may accept the agreed quantity and reject the rest, or he may either reject or accept the whole, but if he accepts the whole he must pay for them at the agreed rate. Thus, where there is a contract to sell 1,000 lbs. of tea at 2*s*. a lb., and the seller delivers 1,200 lbs., the buyer may reject the whole, or accept 1,000 lbs. and return 200 lbs, or if he choose he may keep the 1,200 lbs.; but if he choose to keep the whole he must pay for 1,200 lbs. at 2*s*. a lb If the seller deliver the agreed goods mixed with other goods not included in the contract, the buyer may reject the whole or accept the agreed goods and reject the others.

A buyer need never accept the goods by instalments unless delivery by instalments is part of the agreement. When the agreement provides for delivery by instalments which are to be paid for separately and either the seller makes default in the delivery of an instalment or the buyer makes default in paying for an instalment, it depends upon the facts of the case and the terms of the contract whether the party in default has committed such a breach of contract as justifies the other party in repudiating the whole contract, or whether the contract stands so far as it has been carried out, although damages may have to be paid for the breach. For example, a contract is made for the sale of 500 tons of coal, to be delivered in five instalments of 100 tons each, payment to be made on the

delivery of each instalment. Two instalments are made, and the seller fails to deliver the third. In the absence of agreement the buyer cannot return the 200 tons of coal he has accepted or get back the price of them, but he probably has a right to recover damages from the seller for failing to deliver the other instalments. But suppose a contract is made to sell a machine which has to be made by the seller and delivered in three separate pieces at stated periods, each piece to be paid for on delivery. If two pieces are delivered and paid for, and the seller fails to deliver the third, the buyer probably has the right to reject the two pieces delivered, recover the money he has paid, and obtain damages for the breach of contract; for the two pieces of the machine are probably useless without the third piece.

When the seller sends the goods to the buyer by a carrier, delivery to the carrier, whether chosen by the buyer or not, is presumed to be delivery to the buyer. But though the carrier is the agent of the buyer to receive the goods, he is not the agent of the buyer to accept the goods, for of course the carrier probably knows nothing of the terms of the contract. When delivering goods to a carrier (as to a railway or a shipping company), the seller is bound to make a proper and reasonable contract with the carrier on the buyer's behalf, having regard to the nature of the goods and other circumstances. Thus, if the goods were easily damageable it might be improper to send them at "owner's risk" without the consent of the buyer. Where such a proper contract is not made with the carrier, the buyer is justified in refusing to treat delivery to the carrier as delivery to him. If the goods have to be sent by sea, the seller should as a rule give such notice to the buyer as to enable him to insure, as by informing him by what ship and at what time the goods are being sent; or else the seller should himself insure the goods on behalf of the buyer; otherwise in either case the goods are at the seller's risk during transit.

When the seller agrees to deliver the goods at his own risk, this only applies to unusual injury in transit; for in spite of such agreement the buyer takes the risk of any deterioration which is unavoidable and necessarily caused by moving the goods.

Acceptance.—Whenever a buyer has a right to reject the goods, it may become an important question whether he has in fact accepted them and so waived his right to reject. "Acceptance" here is used in a different sense from that in which it was used when dealing with the formation of the contract [1]; in the sense in which the word is now used, "acceptance" means consent to receive the goods in performance of the contract. The buyer is considered to have accepted when he intimates to the seller he has accepted; or whenever the goods have been delivered to him and he deals with the goods in a manner inconsistent with the ownership of the seller; or when he retains the goods beyond a reasonable time without intimating to the seller that he rejects them. A buyer is entitled to a reasonable opportunity of examining the goods on delivery to see whether they are in accordance with the contract; and if he has not previously examined them, he is not considered to have accepted them until he has had that opportunity. If the buyer is justified in rejecting the goods, and does reject them, he need not return them; it is sufficient for him to inform the seller that the goods are rejected. When the buyer wrongfully refuses on request to receive the goods within a reasonable time of such request he is liable to compensate the seller for any loss caused by such refusal, and to pay for the care and custody of the goods; but this does not affect the rights of the seller when the buyer refuses to accept at all and repudiates the contract.

[1] See *ante*, p. 107.

RIGHTS OF THE SELLER

A seller is said to be an " unpaid seller " when the whole price has not been paid or tendered, or when a cheque or bill of exchange is given by way of payment and is dishonoured.

The Seller's Lien.—As a general rule, an unpaid seller who has not parted with the possession of the goods has a lien upon them for the price, whether the ownership of the goods has passed to the buyer or not. A lien is a right to retain possession of the goods until he is paid.[1] Of course this right does not as a rule exist when the seller has sold the goods upon credit; but, even in that case, the seller has a lien if the goods are still in his hands when the time of credit has expired without payment, or if the buyer become insolvent before the expiration of that period The seller has this right of lien in case of insolvency of the buyer even when he has possession of the goods as agent or bailee [2] for the buyer. For example, a tea merchant, who was also a warehouseman, sold a large quantity of tea, and agreed with the buyer to warehouse the tea till required. Part of the tea was withdrawn from the warehouse by the buyer from time to time as required. But when £1,200 worth of tea which had not been paid for was still held by the seller as warehouseman on behalf of the buyer, the buyer became insolvent. The trustee for the creditors of the buyer then demanded the delivery of the tea; but it was held that the seller had a right to retain possession until he was paid, although he was holding the tea as agent for the buyer.[3] If the seller has already delivered part of the goods, he can, as a rule, stop further dealing and exercise his lien upon the rest of the goods until payment.

As soon as the seller has delivered the goods to a carrier to be carried to the buyer his lien is gone. It is also gone

[1] In Scotland the seller's lien is called his right of retention.
[2] The Scotch term for bailee is " custodier."
[3] *Grice* v. *Richardson*, 3 Ap. C. 319.

as soon as either the buyer or any agent for the buyer lawfully obtains possession of the goods. If an unpaid seller sue the buyer for the price, he may still exercise his lien, and even obtaining a judgment for the price does not destroy the lien unless the judgment is satisfied.

Stoppage in transitu.—Whenever a seller has sold goods and has not been paid, whether the ownership of the goods has passed to the buyer or not, the seller as long as the goods are in transit has a right to call upon the carrier to stop delivery and return the goods to the seller (or otherwise deal with them) on learning of the insolvency of the buyer.[1] This is called the right of stoppage *in transitu* : and for the existence of this right two conditions are necessary : (*a*) that the transit of the goods is not at an end, and (*b*) that the buyer is insolvent. The transit begins the moment the goods are handed over to a carrier for the purpose of being transported either by land or water to the buyer; and it lasts until the goods have come into the hands of the buyer or any one who takes delivery as agent for the buyer. If the buyer or his agent obtain delivery of the goods before the appointed destination is reached, the transit is at an end. Also, when the goods reach their destination, and are, by agreement between the buyer and the carrier, warehoused or held by the carrier on behalf of the buyer, the transit is at an end. In that case the goods are in the hands of the carrier, not as carrier but as agent for the buyer, and are therefore constructively in the possession of the buyer. If tender of delivery of the goods be made by the carrier to the buyer, and the buyer reject them, the transit still continues as long as the goods remain in the carrier's hands, even if the seller refuse to take them back. When the carrier without lawful excuse refuses to deliver the goods to the buyer or his agent, the transit is at an end. If the carrier has delivered part of the goods before receiving notice to stop from the seller, he

[1] But subject to the carrier's lien (see p. 185).

is, as a rule, bound to stop delivery of the remainder on receiving notice. The seller exercises his right usually by giving notice of his claim to the carrier, but if that be possible he may actually seize the goods. When notice is given, it may be given either to the person who actually is in possession of the goods or to his principal. For example, if the goods be on a railway truck, notice may be given to the station-master of a station where the truck happens to be, *or* to the railway company, his employers. But if notice be given to the company, it must be given in such circumstances that they have time, with reasonable diligence, to discover what point of the transit the goods have reached, and to give their servants or agents instructions to stop delivery.

If sufficient notice be given, and in spite of such notice the carrier deliver the goods, the carrier will be answerable for any loss which the seller may suffer in consequence. When the carrier has stopped delivery according to his instructions, he must deal with the goods as directed by the seller, but the seller must bear all expenses of returning the goods to him or delivering them as otherwise ordered. When the seller has regained possession of the stopped goods he has the right to retain them until he is paid.

As a rule, the right of an unpaid seller to a lien or to stop *in transitu* is not affected by any re-sale which the buyer may make without the assent of the seller, but if the buyer has lawfully received a bill of lading or other document of title to the goods, and he transfer that document to a person who takes it in good faith and gives value for it so that he becomes the buyer of the goods, the right of the seller to a lien or to stop *in transitu* is gone.

When an unpaid seller retains possession of the goods in exercise of his right of lien, or in virtue of having stopped them in transit, the contract of sale is not at an end, and the buyer can claim delivery of the goods on tender of the price. But the seller is not bound to keep the goods for more than a reasonable

time. If the goods are of a perishable nature he may re-sell them at once, and so avoid certain loss to every one concerned. If the goods are not of a perishable nature he must give notice to the buyer of his intention to re-sell, and allow the buyer a reasonable time after such notice in which to find the money. If the buyer be unprepared within such time to pay for the goods, then the seller may re-sell them, and recover from the buyer any loss he may have suffered through the buyer's breach of contract. In any case, when the seller re-sells the goods the second buyer gets a good title to the goods.

Where it is a condition of the contract of sale that the seller may re-sell in case the buyer make any default, and the buyer does make such default, and the seller does re-sell, the original contract is rescinded, but the seller may nevertheless have a right to damages against the buyer.[1]

Action by Seller.—When by the contract the ownership of the goods has passed to the buyer, the seller may bring an action for the agreed price as soon as the buyer is in default in paying in the way agreed. This action he may bring although he is holding the goods in exercise of his right of lien or has stopped the goods in transit. When by the contract the price of the goods is to be paid on a certain day irrespective of delivery, the seller can bring an action for the price if it be not paid on that day, whether the ownership has passed to the buyer or not, and whether goods have been appropriated to the contract or not.[2] Whenever the buyer wrongfully refuses to accept and pay for the goods, he is liable to an action by the seller for damages for not accepting. The damages which can

[1] In Scotland a seller may by legal process attach the goods in his own possession, just as they might be attached in his possession by a third party, to avoid the result of further proceedings.

[2] In Scotland a seller is entitled to recover interest on the price from the date on which it ought to have been paid, or from the date on which the goods were tendered and wrongfully rejected. There is no right to interest in England except by agreement.

be recovered will be measured by the loss to the seller which is the natural result in the ordinary course of the buyer's breach of contract. The damages must always depend on the circumstances of the case, and no stricter rule can be stated. The amount recoverable is generally far short of the price, for of course the seller has the goods, and it would clearly be unjust for him to have both the goods and the price. The damages may, however, be quite as great as the price if the seller cannot sell the goods to any other person. Thus, if a photographer make a set of photographs of a person who wrongfully refuses to accept them, probably no one else will buy the photographs, they are quite useless to the photographer, and he can recover from the buyer the full contract price of the goods. Again when there is a contract for the sale of perishable goods and the buyer wrongfully refuses to accept the goods, they may decay and be useless before another buyer can, with reasonable diligence, be found. In this case the damages would probably be the same as the price. When there is an available market for goods which the buyer has wrongfully refused to accept, the damages recoverable are presumed to be the difference between the contract price and the market price on the day when the goods ought to have been accepted. For example, a contract is made for 1,000 gallons of petroleum at $6\frac{3}{4}d.$ a gallon, to be delivered on 20th June. On delivery being tendered on the agreed day, the buyer refuses to accept. Meanwhile, since the contract was made the market price of this petroleum had fallen to $6\frac{1}{4}d.$ a gallon, and at that price the seller re-sells the 1,000 gallons. The seller is entitled to recover damages to the amount of 1,000 halfpennies, or £2 1*s.* 8*d.* In such cases, if the price has not altered, or has risen, the damages recoverable may be purely nominal, and practically the buyer is under no liability.

When the ownership of the goods has not passed to the buyer, and the buyer wrongfully refuses to accept them, the seller has only a right to damages; but when the ownership

has passed, the seller may either sue for the price (if he be unpaid) or for damages, as he chooses.

RIGHTS OF THE BUYER

The buyer has a right to have the goods delivered to him as agreed, or within a reasonable time If the seller wrongfully fail or refuse so to deliver the goods, the buyer may bring an action against him for damages. The amount of such damages will be measured by the loss to the buyer which is the direct and natural result in the ordinary course of things of the seller's breach of contract. Therefore all the circumstances must be considered in each case in order to estimate the damages, and each case must depend on its own facts.

If the buyer want the goods for a special purpose, which fact is not known to the seller, he cannot recover the damages he has suffered through not being able to carry out that purpose. But if the seller make the contract knowing that the goods are for a special purpose, and with this knowledge fail to deliver the goods, he is liable to pay to the buyer damages for the loss he has suffered through the goods not being delivered as agreed.

If the goods are goods for which there is an available market, the buyer may buy other goods in the market. Then, if he have to pay more for the goods than the contract price, he can recover as damages from the seller the difference between the contract price and the market price at the time when the goods should have been delivered. If the buyer can readily get goods in the market at a price not greater than the contract price, he probably has only a right to nominal damages against the seller; but even in this case he may have a claim for any loss he has suffered by delay.

The buyer also has a right to recover damages for breach of warranty by the seller, and such damages are measured by the loss naturally resulting from the breach.

Where the contract is for the sale of specific goods which the seller refuses to deliver, the Court has power to order the actual goods sold to be delivered up to the buyer. This power, however, is very seldom exercised,[1] and when it is exercised, the goods usually consist of some unique article which cannot be obtained elsewhere, as, for instance, a picture by some well-known artist.

DOCUMENTS OF TITLE

In business it is customary in many cases to use certain documents as proof of the possession of goods and of the right to dispose of goods. The possession of such a document is treated as possession of the goods; and the goods may be sold and delivered by transferring the document for value to a buyer. The goods can be obtained by production of the document; and the document can be transferred by mere delivery or by indorsement and delivery. Such documents are called "documents of title" to the goods, and the regular transfer of such a document is symbolical of delivery of the goods.

A "dock warrant" is an example of such a document. When goods from aboard ship are landed, they may, instead of being carried away, be given into the custody of a dock company by the person who has a right to dispose of them. In return for the goods the dock company hands to the person depositing them a document which describes the goods, acknowledges the receipt of them, and undertakes to deliver them to the order of the depositor. This document is called a dock warrant. The person to whom it is given may sell the goods and give the buyer the right to have them handed over to him by the dock company by indorsing the dock warrant and handing it to the buyer. The dock company must deliver the goods to any person who produces the dock warrant so indorsed.

[1] That is, in England or Ireland; it is exercised quite freely in Scotland.

Other examples of documents of title to goods are warehouse-keeper's certificates, which are similar in nature to dock warrants, and bills of lading, which will be dealt with later.[1] In many cases such documents of title may be bought and sold or otherwise dealt with just as if they were the goods they represent.

Where a mercantile agent [2] is, or has been, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale or other disposition of the goods made by him in the ordinary course of his business is as valid as if he had the authority of the owner to make the sale; provided the buyer acts in good faith without notice that the mercantile agent is acting without authority or that his authority has been withdrawn.

[1] See pp. 189–191. [2] See p. 63.

PART IX

NEGOTIABLE INSTRUMENTS

It has been already stated that, as a general rule, one party to a contract can only assign his rights under the contract to a third person, subject to any existing rights against him which the other party to the contract may have.[1] Negotiable instruments, however, form exceptions to this general rule.

A *negotiable instrument* is a *document containing a contract*, to the ownership of which document are attached all rights under contract. Whoever is in *bona fide* possession of such a document is presumed to be the lawful owner of it, and therefore entitled to enforce all rights under the contract. The document, and with it all rights under it, is transferred either by mere delivery or by delivery accompanied by indorsement. And the person who in good faith takes it, takes it free from any rights which might be enforced against the person from whom he takes it, and free from any defect in the title of such person.

An example of a negotiable instrument has already been given in a dock warrant.[2] The simplest example possible is a Bank of England note. This is a promissory note issued by the Bank undertaking to pay a certain amount to the bearer. If a bank-note be stolen by a pickpocket, and the thief go to a shop and buy an article and give the bank-note in payment, going away with the article bought and the change, the shopkeeper, who acts innocently, has a perfect right to the note, and to receive payment of it from the Bank. Other examples

[1] See *ante*, p. 46. [2] See *ante*, p. 133.

of negotiable instruments are dividend warrants, debentures payable to bearer, and Exchequer Bills. A bill of lading, also, has many of the qualities of a negotiable instrument. Bills of Exchange and Promissory Notes are, however, the best-known and most widely used kinds of negotiable instruments.

BILLS OF EXCHANGE [1]

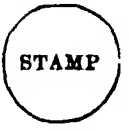
"A bill of exchange is an unconditional order in writing, addressed by one person (A) to another (B), signed by the person giving it (A), requiring the person to whom it is addressed (B) to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person (C), or to bearer." A document which does not satisfy this definition, or which orders anything to be done in addition to the payment of money, is not a bill of exchange. An inland bill is one which is both drawn and payable within the British Islands, or drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill. A bill of exchange payable on demand (*e.g.* a cheque) may be stamped with an adhesive twopenny stamp. Other inland bills and promissory notes must be written on stamped paper, the stamp being impressed, and the value of the stamp depending on the amount for which the bill or note is drawn, *i.e.* the duty being *ad valorem*. The duty on foreign bills is payable by adhesive stamps affixed after they come into this country. An inland bill or note cannot be stamped after it is made.

It will be noticed that there are three parties to a bill of exchange: (1) the person who addresses it to another, A, who is called the drawer; (2) the person to whom it is addressed, B, who is called the drawee, but who later in due course becomes the acceptor; and (3) the person, C, to whom A requires B to pay the sum of money mentioned, and who is called the

[1] The law on Bills of Exchange, Cheques, and Promissory Notes is contained in the Bills of Exchange Act, 1882, which constitutes a code on the subject.

payee. Two of the parties may, however, be the same individual: thus, frequently the drawer and the payee are the same person. Again, two or more persons may jointly form a party.

Here is an ordinary form of a bill of exchange—



£100. *London, 15th January*, 1931.

Three months after date pay to Mr. John Brown or order the sum of one hundred pounds for value received.

WILLIAM WHITE.

To Mr. ROBERT GREEN.

In the case of this bill William White is the drawer, Robert Green is the drawee, and John Brown is the payee. It will be at once obvious that, as this bill stands, Robert Green is under no liability whatever upon it; for the mere fact that William White makes a writing calling upon him to pay John Brown a sum of money cannot of itself make Robert Green liable to pay John Brown that money. There is nothing to prevent any person from drawing a bill upon any other person, but such an act cannot of itself affect the rights of that other person, who may be in complete ignorance of the existence of the person drawing the bill upon him. If it is desired to make Robert Green a responsible party to the bill, he must be asked to consent to become such a party, by assenting to the order of the drawer. This he does by "accepting" the bill, which acceptance is usually expressed by writing his name across the face of the bill with the word "accepted." His signature, however, across the face of the bill has the same effect whether or not the word "accepted" is written. The bill then appears as in No. I. below. Other forms of bills of exchange are given in Nos. II., III., and IV.

No. I.

£100. *London, 15th January*, 1931.

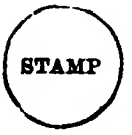
Three months after date pay to Mr. John Brown or order the sum of one hundred pounds for value received.

WILLIAM WHITE.

To Mr. ROBERT GREEN.

Accepted Robert Green.

No. II.



£162. *Leicester, 20th November*, 1931.

Two months after sight pay to Mr. Walter Young or order one hundred and sixty-two pounds for value received.

PAYNE, SMITH & CO.

To Messrs. J. & T. WILSON & Co.

Accepted payable at Lloyd's Bank, Birmingham. J. & T. Wilson Co. 2 Dec 1931

No. III.

£78. *Nottingham, 3rd February*, 1931.

On demand pay Mr. Arthur Davis or order the sum of seventy-eight pounds.

THOMAS BRIGHT.

To Mr. PAUL HOBBS.

Accepted for £50. Paul Hobbs

No. IV.

£345. *Leeds, 10th March*, 1931.

Sixty days after sight pay to my order the sum of three hundred and forty-five pounds.

HENRY NASH.

To Messrs. BAKER & GLYN.

Accepted payable only at Carr's Bank, Bradford. Baker & Glyn, p/a Jas. Baker. 8 April 1931

Although these are the usual forms, no particular form is necessary.

It is usual to state that the bill is for "value received," but the omission of these words is immaterial. Every bill is presumed to have been given for value until the contrary is proved. Any consideration which is sufficient to support a

simple contract is value for a bill. Also, any debt or liability already existing before the bill is drawn constitutes valuable consideration for the bill.

The absence of a date does not invalidate a bill, and any holder may insert the true date where it is omitted; nor does the absence of the address of the drawer in any way invalidate a bill.

A bill must be payable either on demand, as in No. III. ("at sight" or "on presentation" have the same meaning); or at a fixed future time, as in No. I.; or at a determinable future time, as in No. II. In the last case the time is determined by reckoning from "sight," *i.e.* from the time when the bill is presented for acceptance. A bill may be payable at a fixed time after the happening of an event which is certain to happen, though the time of happening may be uncertain; as, "Two months after my death pay," etc. But a bill cannot be made payable at a time contingent on the happening of an event which may never happen, *e.g.* thirty days after arrival of ship *Arabia* at Liverpool.

A bill must be for a "sum certain" in money. It is, however, none the less a sum certain because it is required to be paid with interest, or by stated instalments, or at an indicated rate of exchange. If the sum be expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable.

Unless a bill be payable to bearer a payee must be named, or otherwise indicated with reasonable certainty. He may, however, be described by his office as "Pay to the Secretary of the X Company or order." When the payee is a fictitious or a non-existing person the bill may be treated as payable to bearer. A person may be "fictitious," though a real and existing person, if his name is inserted by way of pretence, the drawer not intending the person so designated to receive payment. Thus, where a clerk drew bills in the name of a customer of the firm, and inserted the names of other customers

as payees, and having induced the firm to sign as acceptor, forged the indorsements, and cashed the bills, it was held that, as the drawer's name was forged, he never intended the payees to have any rights, and, though the payees were real persons, their names were inserted by way of pretence, with the result that they were fictitious persons, and the bills were payable to bearer.

Acceptance.—As has been already stated, acceptance is expressed by the drawee writing his name, either with or without the word "accepted," on the face of the bill. The acceptance is a promise to pay money, and a promise to do anything else is not an acceptance. A bill may be accepted before it is signed by the drawer, or when it is incomplete in some other way, or when it is overdue.

The acceptance may be to pay at a particular place, as when the acceptor undertakes to pay at a certain bank (as in No. II., in which the bill is payable at Lloyd's Bank, Birmingham).

An acceptance may be either (*a*) general, or (*b*) qualified. A general acceptance is one without any qualification which varies the effect of the bill, as the acceptances in No. I. and No. II. It is to be noticed that an acceptance to pay at a particular place, as in No. II., is a general acceptance unless the acceptance expressly state that the Bill is to be paid at that place and only at that place.

An acceptance is qualified which by its terms varies the effect of the bill as drawn. This qualification may be *local*, as when the bill is accepted payable *only* at a certain place, as in No. IV.; it may be *conditional*, as when the acceptor makes payment depend on some condition, as "accepted payable on safe arrival of steamship *Venus*"; it may be *partial*, that is, an acceptance to pay part only of the amount for which the bill is drawn, as in No. III.; it may be a qualification in *time*, as if in No. I. the acceptor were to write "accepted payable six months after date"; or it may be a qualification through the bill having been drawn on several persons and some of them

only accepting. The holder of a bill may refuse to take a qualified acceptance, and may treat the bill as dishonoured if he is unable to obtain an unqualified acceptance.

A bill is drawn with the intention that the drawee shall become a party to it and shall eventually pay it. If a drawee refuse to accept a bill when presented to him for acceptance, he is said to dishonour it. And if an acceptor refuse to pay a bill which he has accepted when it is presented to him for payment, he has dishonoured it As a general rule a bill payable at a fixed time (as No. I.) need not be presented for acceptance till it is presented for payment. But when it is payable after sight (as No. II) it must be presented for acceptance in order to fix the maturity [1] of the bill, for the time of payment depends on the date of acceptance or presentment. A bill must also be presented for acceptance when there is an express stipulation that it should be presented, also when it is drawn payable elsewhere than at the residence or place of business of the drawee. Where presentment for acceptance is not strictly necessary, it is none the less in most cases usual and prudent, for without acceptance the holder has not the security of the drawee's credit. A bill payable after sight must be presented for acceptance within a reasonable time or else the drawer and indorsers may be discharged from any liability upon it. When a bill is dishonoured by non-acceptance the holder acquires an immediate right of recourse against the drawer and indorsers, and no presentment for payment is necessary.

If a bill be drawn on more than one person who are not partners, it must be presented for acceptance to each of them, unless one has authority to act for the others. Presentment for acceptance is excused when the drawee is dead, or a bankrupt, or a fictitious person, or an infant; also where after the exercise of all reasonable steps to present the bill presentment cannot be effected, *e.g.* because the drawee cannot be found.

[1] See *post*, p. 144.

If the drawee is dead, the bill may be presented to his executors or administrators; and if he is bankrupt it may be presented to his trustee. When agreement or usage authorizes such a course presentment may be made through the post.

Negotiation.—When a bill is drawn and accepted, or sometimes when it is only drawn and has not yet been presented for acceptance, it is in the usual course handed to the payee.

A bill may be drawn payable "to A B," or "to A B or order," or "to bearer," or "to A B or bearer." If a bill is drawn payable "to A B," the effect is the same as if it had been drawn "to A B or order" or "to the order of A B." The payee, or any one to whom the bill is indorsed who is in possession of it, or the bearer of the bill, is called the holder of the bill.

A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the person to whom it is transferred the holder of the bill. If it is payable to bearer it is negotiated merely by delivery. If it is payable to order it is negotiated by the holder indorsing it and then delivering it. The indorsement consists of the name of the holder written on the back of the bill.

When a bill is payable "to A B or order," and is indorsed by A B and delivered to C D, it is then payable to bearer, and C D can negotiate it by mere delivery without further indorsement. An indorsement cannot be partial, *i.e* cannot transfer a part only of the amount payable by the bill

An indorsement consisting of the name of the indorser only without any accompanying words is called an indorsement in blank. If the indorser specifies the person to whom the bill is payable—as when A B the holder indorses, "Pay C D or order, A B"—the indorsement is said to be special. In this case C D must indorse the bill in order to negotiate it. As soon as C D has indorsed it by his signature merely, the bill is again indorsed in blank, and can be negotiated by a holder subsequent to C D by mere delivery as payable to bearer. When a bill

has been indorsed in blank, any holder may specially indorse it by writing above the indorser's signature a direction to pay the bill to any named person.

The further negotiation of a bill may be prohibited by a restrictive indorsement, as "Pay E F only," or "Pay E F for the account of X Y," or "Pay E F or order for collection." In such cases E F must not further negotiate the bill.

Holder in Due Course.—A holder in due course of a bill is one who has taken the bill under the following conditions: (1) that it was complete and regular on the face of it; (2) that he took it before it was overdue, and without notice (if such was the fact) that it had been dishonoured; (3) that he took it in good faith and for value, and without notice of any defect in the title to it of the person from whom he took it.

Rights of Holder.—The holder of a bill may sue upon the bill in his own name. If he is a holder in due course he holds the bill free from any defect of title of the person from whom he took the bill or any party to the bill. If the holder is not a holder in due course he has no better right to enforce the bill than the person from whom he took it. For example, A accepts a bill drawn by B and payable to B or order for the price of goods bought by sample from B. The goods when tendered are found to be not according to sample, and accordingly rejected by A. In these circumstances B cannot recover the amount of the bill from A, for the consideration for which the bill was given has failed. But if B indorses the bill to C, who gives value for it and in good faith before it is overdue, knowing nothing of the facts, C is a holder in due course and has the right to compel A to pay the amount of the bill. On the other hand, if, when B indorses the bill to him, C knows all the facts, C becomes a holder, but not a holder in due course, for he has notice of the defect in B's title to the bill. Therefore C has in this case no better right to enforce payment against A than B had. Again, suppose D to be the holder of a bill which is overdue, and he negotiate it to E. As E takes

the bill after it is overdue he is not the holder in due course, and can have no better right to enforce payment of the bill than D had. So that if D had a right to enforce payment E has as good a right; but if D had no right E has no right.

The date shows whether a bill is overdue or not, except in the case of bills payable on demand. A bill payable on deman is deemed to be overdue when it has been in circulation for an unreasonable time.

Where a bill which is not overdue has been already dishonoured, that fact does not affect the rights of any person who *bona fide* takes the bill without notice of the dishonour, but no one who takes the bill with notice of the dishonour can become a holder in due course.

Forged Signatures.—A forged or unauthorized signature has no value; and no one can obtain a right to retain a bill or give a discharge for it, or enforce payment of it through such signature. Thus, when a bill payable to order is stolen from the payee and negotiated by the thief, who forges the payee's signature, the indorsee acquires no rights in the bill. But when the signature of the drawer is forged, the acceptor is not able to set up this forgery against an innocent holder, for he is not allowed to deny the genuineness of the signature of the drawer to a bill which he has accepted.

Payment.—The holder of a bill who desires to be paid the amount of the bill must duly present the bill for payment to the acceptor. If he fail to do this the drawer and indorsers are, as a rule, discharged from liability. When the bill is payable on demand presentment must be made within a reasonable time after its issue in order to make the drawer liable, and within a reasonable time after indorsement to make an indorser liable. The bill when not payable on demand must be presented on the day on which it matures or falls due. The day is ascertained by adding three days, called "days of grace," to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace. If that day

fall on Sunday, Christmas Day, Good Friday, or any day appointed by Royal Proclamation as a public feast or thanksgiving day, the bill is due and payable on the preceding business day. If the last day of grace fall on one of the four regular bank holidays, or if the last day of grace is a Sunday and the second day a bank holiday, the bill is due and payable on the succeeding business day. In reckoning time the day from which the time is to run is not counted, but the day of payment is counted. Thus, where a bill payable three months after sight is accepted on 1st March, it is payable on 4th June. "Month" always means calendar month.

Presentment for payment must be made at the proper place, at a reasonable hour, to the person who is bound or authorized to pay, and by or on behalf of a person entitled to payment.

When a place of payment is specified in the bill, that is the proper place for presentment. When no place of payment is specified, but the address of the acceptor is given, that address is the proper place of payment. In other cases the bill should be presented at the acceptor's place of business if known, or if not known at his residence; and failing either place to him personally wherever he can be found, or at his last-known place of business or residence. If the bill is presented at its proper place, but after reasonable diligence the acceptor cannot be found, no further presentment is required. A presentment by post is sufficient if that course is authorized, either by agreement or by usage in the trade or business in which the parties are concerned, or in the previous course of business between the parties themselves.

Delay in presentment for payment is excused when the delay is not due to default or negligence on the holder's part. Presentment for payment is dispensed with: (*a*) when after the exercise of all reasonable diligence it cannot be effected; (*b*) when the drawee is a fictitious person, (*c*) as regards the drawer, where the drawee or acceptor was under no obligation

to the drawer to accept or pay the bill, and the drawer had no reason to believe that it would be paid if presented; (*d*) as regards an indorser, when the bill was accepted or drawn for his accommodation, and he has no reason to expect the bill to be paid if presented; (*e*) by waiver of presentment either express or implied.

Liability of Acceptor.—The acceptor of a bill is the party who is primarily liable upon it. Obviously on the face of the contract it is he who is intended to pay the amount mentioned in it. By the act of accepting, the acceptor undertakes to pay the bill according to the tenor of his acceptance. Hence if he give a qualified acceptance he is only bound to pay subject to the qualification.

By accepting the acceptor acknowledges the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill; and he cannot afterwards deny these things. He also admits the existence and capacity of the payee, but not the genuineness of his indorsement.

Blank Signature.—Where a simple signature on a blank stamped paper is delivered by the signer to be converted into a bill, it operates as authority to fill it up as a complete bill for any amount the stamp will cover. If such an instrument be completed and negotiated to a holder in due course, he may enforce it as a valid bill.

As soon as the acceptor has dishonoured the bill by refusing to pay it, he may be sued upon it. As against a holder in due course the acceptor can seldom have a defence to an action for the amount for which he accepted the bill except in the case of forgery. As against any other holder he may have a good defence. If he has accepted the bill without consideration, that fact is no defence as against a holder in due course who has given value for the bill to some previous holder; and it makes no difference that the holder in due course knew that the acceptor received no consideration. If, however, he accept a bill without consideration, that fact is a good defence to an

action by a payee who gave no consideration, or by a holder who took the bill from such payee without giving consideration for it. Again, suppose A has accepted a bill, drawn by and payable to the order of B, for the price of goods which B has failed to deliver. Here A has probably a good defence on the bill if he is sued upon it by B because he accepted the bill for the price of goods which B has not delivered. But if B negotiate the bill for value to C, who takes it *bona fide* without knowledge of the facts so as to be a holder in due course, A has no defence against an action by C.

Liability of Drawer and Indorser.—By drawing a bill the drawer engages that on due presentment it shall be accepted and paid, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it. The indorser of a bill is in a similar position to the drawer, and engages to compensate the holder or any indorser subsequent to himself who has been compelled to pay the bill. The drawer or any indorser may, however, add words to his signature which negative his own liability, such as "sans recours" or "without recourse to me," the effect of which is to leave the holder free to have recourse to any other party to the bill whose liability is not abrogated. Neither drawer nor indorser is liable until the bill is dishonoured, as by his contract each undertakes liability only in case the acceptor make default. As a consequence neither of them is liable unless and until he is given due notice of dishonour.

Notice of Dishonour.—If notice of dishonour be not given within a reasonable time of the dishonour to the drawer and indorsers, the drawer and any indorser not receiving such notice is discharged from liability. If a bill be dishonoured by acceptance being refused, and notice of this dishonour be given, it is not necessary subsequently to give notice of dishonour by refusal of the drawee to pay.

Notice of dishonour need not be given in writing, or in any particular form; the mere return of a dishonoured bill to the

drawer is a sufficient notice. Notice of dishonour must be given promptly; thus, where the holder of the bill resides in the same town as the drawer, the holder should give notice so as to reach the drawer some time on the day after the dishonour at the latest; when they reside in different towns, notice should be given by the first convenient post after the day of dishonour. Where notice of dishonour is not given within a reasonable time the holder of the bill loses all his remedies against the drawer and indorsers. Delay, however, may be excused when the delay is caused by circumstances outside the control of the holder, *e.g.* mistakes of the post office.

Notice of dishonour to the drawer is dispensed with entirely where as between themselves the drawee or acceptor is under no obligation to the drawer to accept or pay the bill Thus where A draws a bill on B, and B owes A nothing and has not consented to accept A's bill, A has no reasonable grounds for surprise if B refuse to accept the bill. Again, when in similar circumstances, B accepts merely to accommodate A and to enable him to raise money, A cannot be surprised if B refuses to pay the bill; in such cases A is not entitled to notice of dishonour. Notice of dishonour is also dispensed with in the following cases: (*a*) When, after the exercise of reasonable diligence, notice cannot be given or does not reach the person to whom it is addressed; for example, when the holder goes to the place of business of the drawer in business hours and finds the place shut up, there being nothing to tell him where the drawer may be found, notice may be excused. (*b*) When the drawer (or an indorser) waives notice, as where the drawer tells the holder that the bill will be dishonoured when presented. (*c*) As regards the drawer, (1) when the drawer and drawee are the same person, (2) when the drawee is a fictitious person or a person incapable of contracting, (3) when the bill is presented for payment to the drawer, (4) where the drawer has countermanded payment. (*d*) As regards the

indorser, (1) where the drawee is a fictitious person or a person not capable of contracting (as an infant) and the indorser was aware of the fact when he endorsed, (2) where the bill is presented for payment to the indorser, (3) when the bill was made or accepted for the indorser's accommodation.

Noting and Protest.—Where an inland bill has been dishonoured it *may* be noted and protested; but a dishonoured foreign bill *must* be protested, or else the drawer and indorsers are discharged. If it be desired to protest a bill a notary must be employed to present it. When he has done so the notary writes on the bill a memorandum consisting of the date, the charges for noting, a reference to the notary's register of such bills, and his own initials. This is "noting" the bill. He also attaches to the bill a slip of paper on which is written the answer (if any) given to him when the bill was dishonoured, *e.g.* "no effects." The "protest" is a formal certificate given by the notary that the bill was dishonoured It contains a copy of the bill, and specifies the person at whose request it was presented, and states the place, date, and other particulars of the presentment, or else the fact that the drawee or acceptor could not be found.

Accommodation Parties and Bills.—An accommodation party to a bill is anyone who signs a bill either as drawer, acceptor, or indorser without receiving valuable consideration for so doing, but merely for the purpose of lending his name to some other person. The person accommodated is bound to provide funds for the payment of the bill at maturity, but whether he do so or not the accommodating party may be compelled by a holder to pay the bill. If he is compelled to pay, the person for whose accommodation he signed is bound to indemnify him.

An accommodation bill is a bill accepted without the acceptor receiving value for so doing. Although he is the party primarily liable on the bill, he is really only a surety for some other person, who himself may or may not be a party to the bill.

The person accommodated in such case is, as between himself and the acceptor, bound to provide the acceptor with funds to meet the bill at maturity.

Order of Liability.—The acceptor (as has been explained) is the party primarily liable to pay a bill. If the bill is dishonoured the drawer is liable in the second place, and then each indorser is liable in the order in which he indorsed. Where there are several indorsements on a bill, each is deemed to have been made in the order in which it appears on the bill until the contrary is proved. Although as between themselves this is the order of liability of the drawer and indorsers, the holder of a dishonoured bill may call upon any one of them he chooses to pay the bill, and if payment is refused may sue that one alone. Any indorser, however, who is compelled to pay the bill has the right to make any other indorser above him repay him. This second indorser having paid has a similar right against any other who indorsed before he did. And so the liability may be enforced successively back to the drawer, who may have to compensate any indorser who has paid. Then the drawer, having paid, has his remedy against the acceptor. The bill having been dishonoured, the holder may call upon any indorser to pay, provided he gives that indorser due notice of dishonour. If the holder means to ignore the drawer and indorsers above the one he selects, he need not give notice of dishonour to them. But the selected indorser, if he wishes to enforce his right against any previous indorser or against the drawer, must as soon as he receives notice of dishonour give notice of such dishonour to the party from whom he intends to demand payment.

The holder of a bill payable to bearer who wishes to negotiate it may have to indorse the bill in order to do so, as the person taking the bill may require the additional security of his name. If he does indorse the bill, his liability is the same as any other indorser. But if the holder of any bill negotiate it without indorsing it, he is under no liability as a

party to the bill. He does, however, warrant to any one giving value to him for the bill that the bill is what it purports to be, and that at the time of negotiation he is not aware of any fact which makes it worthless. Thus if the holder of a bill payable to bearer and purporting to be accepted by A negotiate it for value and in good faith to B, and if it turn out that the acceptance of A is a forgery, the holder will have to pay back to B the money he received from him. Where a bill is negotiated back to the drawer, or to a prior indorser, or to the acceptor, such party may not enforce payment against any intervening party to whom he was previously liable.

Amount Recoverable on Bill.—When a bill is dishonoured the holder may recover from any party liable, and the drawer who has paid may recover from the acceptor, and any indorser who has paid may recover from the acceptor or the drawer or any prior indorser, the following amounts: (*a*) The amount of the bill; (*b*) interest on that amount, from the time of presentment for payment if the bill is payable on demand, or from maturity of the bill in any other case; (*c*) the expense of noting, or, when protest is necessary, the expenses of protest. Thus interest is payable by way of damages, and is usually at the rate of 5 per cent. Interest may also be payable by the terms of the bill itself—as when a bill is drawn for £100 payable six months after date, with interest at the rate of 7 per cent. Here the interest runs from the date of the bill, and the amount payable at maturity is £103 10*s*.

Principal and Agent.—No person is liable as a party to a bill who has not signed it as such; but if a person sign a bill in a trade or assumed name he is liable, just as if he had signed his own name. If a partner sign the name of his firm, the firm is liable, and each partner is liable to the same extent as if he had signed, provided the partner signing was acting within the scope of his authority.

An agent signing a bill for his principal, and signing his own name only, is personally liable on the bill, and the principal is

not liable. A person is none the less liable on a bill because he adds words to his signature of a descriptive nature. Thus, when J. S. draws a bill, signing "J. S., Agent," he alone is liable. His principal is not. So where a bill is accepted for the purposes of a company by two of its directors in this form, "$\left.\begin{matrix} A\ B \\ C\ D \end{matrix}\right\}$ Directors of the X Y Company, Ltd.," the company is not liable as is probably intended, but A B and C D are themselves personally liable. When, however, the person signing adds words clearly indicating that he signs only in a representative capacity, and on behalf of a principal, he is not liable for the bill. Whether or not his principal is liable depends on the extent of the agent's authority. If he has no authority to bind his principal, he may be liable for damages for having assumed an authority he did not possess, but he is not liable as a party to the bill. A signature by procuration operates as notice that the agent has only a limited authority, and such signature only binds the principal so far as the agent's authority extends. In this case the agent usually signs his principal's name, then writes "p p." or "per pro.," and then signs his own name.

Discharge of Bill.—A bill is discharged when all rights of action upon the bill have become extinguished. The bill may be discharged while a party still has a right of action arising out of the same transaction. Thus, if an accommodation acceptor pay the bill it is discharged, but he has a right of action for indemnity against the person for whose accommodation he accepted. A bill is discharged by payment in due course, *i.e.* by payment by the acceptor at or after maturity in good faith to a holder without notice of any defect in his title. Payment by a drawer or by an indorser does not discharge the bill, for he has still rights of action on the bill.

Where the acceptor of a bill becomes himself the holder of it, at or after its maturity, the bill is discharged. It is also discharged when the holder renounces his rights against the acceptor; but in this case either the renunciation must

be in writing, or the bill itself must be delivered up to the acceptor.

When a bill is intentionally cancelled by the holder, and the cancellation is apparent, the bill is discharged. Similarly, any party liable on the bill may be discharged by the holder intentionally cancelling his signature, and such cancellation has the effect of also discharging all indorsers who indorsed subsequently to the signing by that party. A cancellation which can be proved to have been made unintentionally or by mistake, or without the authority of the holder, has no effect.

When a bill is materially altered without the consent of all parties liable upon it, all parties are discharged except a party who has made, authorized, or consented to the alteration, and anyone who indorses after the alteration. An alteration is material which in any way changes the operation of the bill or the liabilities of the parties. Thus any alteration of the date, the amount, the time of payment, or the place of payment, is a material alteration. An alteration which is immaterial has no effect on the bill. Thus if a bill payable to "D or bearer" be altered so as to be payable to "D or order," the bill is not discharged.

When a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of the holder in due course, such holder may avail himself of the bill as if it had not been altered, and has all rights which he would have under the bill as it was before the alteration.

Intervention for Honour.—When a bill has been protested for dishonour by non-acceptance, and is not overdue, any person who is not already liable on the bill may, with the consent of the holder, intervene and accept the bill for the honour of any person liable upon it This is called "acceptance for honour supra protest." Such acceptance is usually for the honour of the drawer, and is assumed to be so unless an express statement is made as to the party for whose honour it is made. To be valid the acceptance must be written on the bill, and must indicate that it is an acceptance for honour. A

bill may be accepted for honour for part only of the amount for which it is drawn. When a bill accepted for honour is payable after sight, its maturity is calculated from the date of the noting for non-acceptance, not from the date of the intervention. By accepting for honour the acceptor undertakes to pay the bill according to the terms of his acceptance, provided it is duly presented to the drawee for payment, that payment is refused by him, that the bill is protested for non-payment, and that the acceptor has notice of these facts. When these conditions are fulfilled the bill must be presented promptly to the acceptor after maturity; for delay will discharge the acceptor for honour, unless such delay be caused by any circumstance which would be sufficient to excuse delay in presentment for payment.

When a bill has been protested for non-payment any person may intervene and pay it for the honour of any party liable thereon. This is called "payment for honour supra protest." In order that such payment should have effect as a payment of the bill and not merely as a voluntary payment the transaction must be certified and attested by a notary. The effect of such a payment is to discharge all parties subsequent to the party for whose honour it is paid; but the person who pays has all the rights of a holder of the bill against the party for whose honour he paid, and against all parties liable to that party.

Bill in a Set.—Sometimes bills are drawn in a set, generally of two or three, each part of the set being numbered and referring to the other parts. Such a bill takes the following form—

Bombay, 17*th April*, 1931.

£1,000.

Sixty days after sight pay this first of exchange (second and third unpaid) to the order of Mr. Albert Johnson the sum of one thousand pounds for value received.

B. REDMOND.

To R. BENTLEY & Co.,
London

All the parts of such a bill constitute but one bill, and only one part is presented for acceptance or accepted. If two or more parts were accepted and such parts got into the hands of different holders in due course, the acceptor would be liable on each to the holder of that part. Also, if the holder were to indorse two or more parts to different persons, he would be liable on each part. If the acceptor were to pay the bill without requiring the part he accepted to be delivered to him, he might be required to pay it again if it were in the hands of a holder in due course. Except in such cases payment of a part discharges the whole bill.

Chief uses of Bills.—One of the principal uses of bills of exchange is to enable persons to obtain immediate payment of money not yet due. It is very common for a manufacturer of goods to supply retail dealers with stock on certain terms of credit, and for the buyer to accept bills for the price of the goods payable at the expiration of the time of credit. For example, A sells goods to B, agreeing to give B three months' credit for the price, but requiring B to accept a bill at three months for that sum. A then draws a bill on B payable to his own order at three months after date, and B accepts this bill. Then A, if he chooses, can keep the bill for the three months, and at the end of that time collect the whole amount from B. Or else if he wish to have the price of his goods before the expiration of the time of credit, he can negotiate the bill by indorsing it to a banker or bill broker. The indorsee is said to "discount" the bill, that is to say, he deducts a certain discount from the full amount payable and pays A the amount of the bill less that discount. The difference between the full amount and the amount paid to A represents the profit of the banker or bill broker. The amount of the discount may depend on the financial position and stability of B. If B's position is thought to be insecure, clearly the discount charged will be high. By this means A obtains payment before the time arrives at which he could call upon B to pay.

Another important use of bills of exchange is to avoid the

necessity of sending money to other countries. Thus, suppose A to be in business in London, and B and C to be in business in India. B owes A £100, and A owes C £100. A then draws a bill on B payable to C. This bill is accepted, and in due course paid by B to C. The rights of all parties are now satisfied, and no money has actually passed from one country to another.

Bills of exchange are also often used for the purpose of raising money on the joint credit of the drawer and the acceptor. Such bills are generally accommodation bills, and are usually accepted by the acceptor in the position of surety for the drawer. The holder looks to the acceptor for his money, but as between themselves the drawer is bound to pay the bill at or before maturity, or to supply the acceptor with the money to pay.

CHEQUES

A cheque is a bill of exchange drawn on a banker payable on demand No bill of exchange can be a cheque which does not strictly satisfy this definition. The form of a cheque is so well known as to need no example. All that has been already said of bills payable on demand in general applies to cheques, subject to what follows. A cheque is not intended to be presented for acceptance, and in the ordinary course of things is not presented to the bank except for payment. It is clear, therefore, that the bank on which a cheque is drawn is seldom liable to be sued upon it. A cheque should be presented for payment within a reasonable time of its issue. A bank will usually refuse to pay a cheque presented more than six months after it was drawn, but this practice is merely a precautionary measure adopted in the interest of the customer (the drawer), and does not rest on any legal foundation. When a cheque is dishonoured the payee or holder in due course, however, in most cases has the right to recover the amount from the drawer until his right is barred by the Statute of Limitations. So that if A draws a cheque payable to B, usually B has a

right of action against A on the cheque until six years have elapsed from the time it was drawn. But when the drawer suffers actual damage by the delay in presenting the cheque, he is discharged to the extent of that damage. For example, if A drew a cheque payable to B, which B neglected to present within a reasonable time; and after the expiration of that time the bank failed and A lost a sum of money standing to his credit at the time of the failure, it is clear that A is a creditor of the bank for a larger sum than he would have been if B had promptly cashed the cheque. To the extent of that sum A is a loser if he pay B the amount of the cheque. In the circumstances, however, he is not bound to pay B the amount of the cheque, but is discharged from his liability to B to the extent of the sum by which he is loser, owing to B's remissness. An indorser is discharged if the cheque is not presented within a reasonable time. What is a reasonable time for presenting a cheque must depend on the circumstances. But where the payee and the banker on whom the cheque is drawn are in the same town, the cheque should in general be presented the day after it is received.

Dishonoured Cheques.—The relationship between banker and customer is that of debtor and creditor; the banker contracting to pay back on demand the sum which he owes the customer, and to honour his cheques as long as he is a debtor and to the extent of his indebtedness. Similarly, if an overdraft is allowed, the banker is the customer's creditor to the extent of the overdraft, usually contracting to honour his customer's cheques up to the limit of the overdraft. It is the duty of the banker on whom a cheque is drawn by his customer to pay it on demand, provided he is indebted to him at least to the extent of the amount of the cheque, or provided that the overdraft is not exceeded. If he dishonour his customer's cheque by wrongfully refusing to pay it, he may seriously injure his customer's credit, and is liable to an action for damages by the customer for so doing, but he is under no

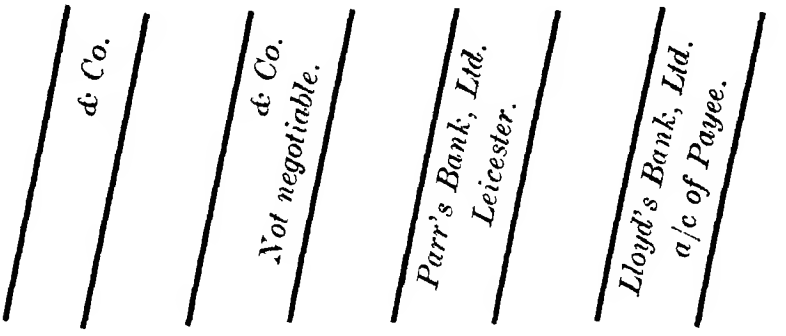
liability to the holder of the cheque, with whom he has no contract. The duty and authority of the banker to pay a cheque are ended by the customer countermanding payment, or (as it is called) stopping the cheque; they are also ended by notice of the customer's death, or of an act of bankruptcy committed by him, and by attachment or assignment of the debt due to the customer by the bank.

When a banker dishonours a cheque, it must be remembered that (as in the case of other bills) the drawer is entitled to notice of dishonour. This notice is dispensed with in certain circumstances. Thus, when the drawer has not sufficient funds to his credit to meet a cheque which he draws, the banker is, as a rule, under no obligation to pay the cheque. In such a case the drawer should not expect the cheque to be paid, and he is not entitled to notice of its dishonour. But when the drawer is entitled to notice of dishonour, and such notice is not given him, he is discharged from liability on the cheque.

Forged Cheques.—A banker is bound to know the signature of his own customer; and so if the drawer's name is forged to a cheque, the banker who pays is the loser, and he cannot debit his customer's account with the amount. But a banker is not bound to know the signature of an indorser of a cheque. Therefore, where the indorsement of the payee of a cheque is forged, and the cheque is presented for payment, and the banker pays it in good faith and in the ordinary course of business, the banker is deemed to have paid the cheque in due course and may debit his customer's account with the amount. An innocent indorsee of such a cheque has, however, no right to enforce payment of it against the drawer, by reason of the rule that no title can be obtained through a forgery.

Crossed Cheques.—A crossed cheque is one which has two parallel lines drawn across its face. If the lines have no words written between them, or only the words "and Company" or "& Co.," or the words "Not negotiable," the cheque is said to be crossed generally. If the name of a banker is

written between the lines, or merely written across the face without lines, the cheque is said to be crossed specially and to the banker named. These are examples of common crossings—



The drawer may cross a cheque either generally or specially. If he does not cross it, any holder may cross it generally or specially. If the drawer crosses it generally, any holder may cross it specially. Either the drawer or holder may add the words "Not negotiable" to a crossed cheque. The banker to whom a cheque is specially crossed may cross it again specially to another banker for collection; and a banker may cross to himself any cheque sent to him for collection which is uncrossed or crossed generally. A crossing is a material part of the cheque, and no person may obliterate the crossing or add to or alter it except as stated.

The holder of a cheque crossed generally cannot obtain payment except through a banker, and the holder of a cheque crossed specially cannot obtain payment except through the named banker. The banker on whom a crossed cheque is drawn may not pay the amount to any one but a banker; and if it be crossed specially he may only pay the banker named. Therefore, if a thief steal a cheque he cannot cash it at the bank on which it is drawn, but can only pay it into his own bank for collection, or cash it with some one who possesses a banking account. If a banker pay in a manner inconsistent

with this duty, he is responsible to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid. But if a crossing is obliterated, or wrongfully altered in such a manner that the change is not apparent, and a banker pay the cheque without negligence and in good faith, he is not responsible. When a banker in good faith and without negligence pays a crossed cheque, he is entitled to stand in the same position as if the cheque had been paid to the true owner, even when through some fraud or irregularity the money has got into the hands of some one not entitled to it. The same applies to the drawer when the cheque has in fact passed through the hands of the payee. Protection is thus conferred by law on the *paying* banker. But the *receiving* banker who receives a cheque to which his customer is not entitled also needs protection against the true owner. Thus a bank may collect or receive a cheque payable to a person whose indorsement has been forged by its own customer. In such case protection is conferred by another provision, that when a banker receives payment of a cheque for a customer in good faith in the ordinary course of business and without negligence, the banker incurs no liability to the true owner of the cheque if it turns out that his customer was not the true owner. Sometimes (as in the fourth example) words are added to a crossing showing that the amount of the cheque is to be paid to a certain account . in such a case the banker collecting the amount places it to the credit of the person named.

Not Negotiable.—Where a cheque is marked "Not negotiable" its negotiable qualities are limited. A holder can still transfer it, and the person to whom it is transferred may be entitled to enforce payment of it. But no one can give a better title to such a cheque than he has himself. Thus, suppose a cheque drawn by A and payable to the order of B is marked "Not negotiable," and after being endorsed by B is stolen from him. Clearly the thief has no title to the cheque. If, then, the thief persuade an innocent shopkeeper to cash the

cheque for him, the shopkeeper acquires no right to payment of the cheque, for the thief can give no better right than he has. If in such circumstances the cheque were not marked "Not negotiable," the shopkeeper would have a good right to enforce payment.

PROMISSORY NOTES

"A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer."

No precise form is necessary to the validity of a note provided that it satisfy this definition. Thus, an I O U is not in itself a promissory note, but may become a promissory note if words are added that bring it within the definition. The usual form is as follows—

£75. *Brighton, 20th May,* 1931.

STAMP

Three months after date I promise to pay to Mr. George Clark or order the sum of seventy-five pounds for value received

EDWARD YOUNG.

Here Edward Young is the maker and George Clark is the payee. In a bill there are primarily three parties, but it will be noticed that in a promissory note there are primarily but two. A promissory note is incomplete until delivery thereof to the payee or bearer. A bank-note is a promissory note made and issued by a banker payable to bearer on demand. A document which promises to do anything other than to pay money is not a promissory note When a document is made in the form of a note payable to the order of the maker, it is not a promissory note until it is indorsed by the maker. Where a note is on the face of it both made and payable within the

British Islands it is an inland note. Any other note is a foreign note.

What has been said concerning bills of exchange applies with the necessary modifications to promissory notes, when the maker of a note corresponds to the acceptor of a bill, and the first indorser of a note corresponds to the drawer of a bill. The law as to acceptance, presentment for acceptance, acceptance supra protest, and bills in a set has no application to notes; and when a foreign note is dishonoured no protest is necessary.

Joint and Several Notes.—A bill of exchange accepted by more than one drawee makes the acceptors jointly liable, and if it is desired to enforce it against them, all must be sued. But a note may be made by two or more makers, and they may either be jointly, or jointly and severally, liable, according to the wording of the note. If they are jointly and severally liable, one may be sued alone, and a judgment against him, if not satisfied, does not discharge any other maker. If a note begins, "We promise to pay," and is signed by two or more persons, it is a joint note. If it begins, "I promise to pay," and is signed by two or more persons, it is a joint and several note.

Liability of Maker.—The maker of a note by making it engages that he will pay it according to its tenor, and is precluded from denying to a holder in due course the existence of the payee or his capacity to indorse. It must be noticed that the maker is the party primarily liable on a note, whereas the drawer of a bill is usually liable only conditionally.

Notes Payable on Demand.—A note payable on demand may be enforced by the original payee at any time within six years of its date, or within such extended time as the Statute of Limitations allows. But if such a note be indorsed, it should be presented for payment within a reasonable time of the indorsement. What is a reasonable time depends on the facts of the particular case. If it is not presented within a reasonable

time the indorser is discharged, but the liability of the maker is not affected. A note payable on demand is not to be deemed overdue, so as to affect the rights of a holder, by reason that a reasonable time for payment has elapsed since its issue.

Presentment for Payment.—Where a note is in the body of it expressed to be payable at a named place, it must be presented for payment at that place. Otherwise presentment for payment is not necessary in order to render the maker liable. In order to render an indorser liable, however, the note must have been presented for payment; and notice of dishonour must be given to the indorser. Where a note is in the body of it made payable at a particular place, it must be presented at that place in order to render an indorser liable; but when a place of payment is indicated by way of memorandum only, presentment at that place or to the maker elsewhere is sufficient. Presentment for payment may be excused on the grounds stated previously in regard to bills.

PART X

CARRIAGE OF GOODS

The Common Carrier.—The carriage of goods, whether by land or sea, is (as a rule) conducted by persons or companies who make carrying their business. Anyone who holds himself out to the public as prepared to carry goods for anyone who wishes to employ him and is ready to pay his charges is a "common carrier." Hence railway companies and ship-owners may be common carriers. A common carrier does not necessarily hold himself out as ready to carry goods of all sorts, and he probably only professes to carry goods to certain places; but a common carrier must not refuse, without lawful excuse, to carry goods for anyone who asks him, provided the goods are such as he professes to carry, provided the destination is a place to which his operations extend, and provided the person forwarding the goods is prepared to pay his charges. His charges, however, must be reasonable; and to demand an unreasonable sum for the carriage of goods is equivalent to a refusal to carry the goods. He may, however, have a lawful excuse for refusing, *e.g.* if his vehicle or vessel were full, and he had no means of carrying the goods offered. If a common carrier wrongfully refuse to carry goods offered to him, he is liable to an action for damages for such wrongful refusal.

A common carrier is an insurer of the safe delivery of goods which he accepts for carriage. The general rule is that a bailee, or person entrusted with another's goods, is only responsible for them if they are lost or injured by his (the bailee's) negligence. A carrier, however, by merely receiving goods for carriage in the ordinary course of his business, undertakes

that the goods shall be safely delivered, quite apart from any question as to whether loss or injury may be due to his negligence. For example, he is answerable if the goods be stolen from him; he is answerable if they be taken from him by force; he is answerable if they be destroyed by a fire for which neither he nor his servants were to blame; he is answerable if he be defrauded into handing the goods over to the wrong person.

There are, however, exceptions to the general rule that a carrier is an insurer of the goods carried. These are: (1) when loss or injury is caused by the act of God; (2) when loss or injury is caused by the King's enemies; (3) where injury comes from a defect in the thing itself; (4) where the loss or injury is due to the default or negligence of the sender of the goods himself, provided that the carrier could not with due care have avoided harm in any such case.

Act of God.—The first exception is usually stated in this old-fashioned but expressive language. "Act of God" means an act of nature of such extraordinary description or degree that no reasonable carrier could be expected to guard against or foresee it. Ordinary acts of nature, as rain or frost, must be anticipated and guarded against by the carrier, and he is responsible if the goods be injured by such occurrences; but he is not bound to guard against a flood of unparalleled height, an extraordinary snowstorm, a stroke of lightning, or other such uncommon occurrence; and if the goods are destroyed by an event of this sort, the carrier is not responsible for any loss thereby incurred. Such occurrences are extremely rare in the case of land carriage, but much more common in the case of carriage by sea.

King's Enemies.—The expression "King's Enemies" means the forces of a State with which this country is at war. If a merchant ship is captured by the warship of a hostile foreign country, the owner is not responsible for goods taken by the enemy which he was carrying on board that ship as a common carrier. Armed rebels or rioters or robbers do not come within

the expression King's Enemies; but doubts have been expressed as to whether pirates, as the enemies of all nations, are not included.

Inherent Vice.—It sometimes happens that goods contain within themselves some latent natural defect, or, in other words, some "inherent vice." This defect may develop on the journey and cause injury to the goods. For example, fruit or fish, although carried with all reasonable care, may become decayed on the journey; or liquids may be partly lost by evaporation or leakage without any fault on the carrier's part. He is not responsible for injury from such a cause. But the best examples of this exception are supplied by animals. The dispositions of animals vary considerably, and their tempers are uncertain. Carriers must make provision against ordinary unruliness arising from temper or fright on the part of animals which they carry, but they are not bound to make provision against the consequences of extraordinary violence, or fright, or temper. For example, Blower sent a bullock from a place in South Wales by the Great Western Railway Company. The bullock was loaded with others to Blower's satisfaction in an ordinary cattle-truck. By an extraordinary display of agility this bullock managed on the journey to get over the side of the truck, and was killed on the line. Blower sued the railway company for the value of the bullock; but as the railway company had behaved with all reasonable care, and the accident was due to extraordinary agility which amounted to a defect or vice on the part of the bullock, it was held that the company were not responsible.[1]

Negligence of the Consignor.—Although a consignor of goods is entitled to call upon the carrier to compensate him for loss or injury to the goods, in many cases in which the carrier is not in fault, he cannot make a carrier pay for loss or injury due to his own fault alone. This subject will be dealt with a little later.

[1] *Blower* v. *Great Western Railway Co.*, L. R. 7, C. P. 655.

It will be seen that a carrier undertakes a very serious responsibility, and that this responsibility is especially great in the case of goods of great value but small size, and in the case of brittle goods, or such as are very easily injured. To avoid part of this responsibility, carriers used to post up notices in the places where they received goods, limiting their liability for certain classes of goods. Then if they could prove that any such notice came to the knowledge of the consignor at the time when the goods were delivered to the carrier, the terms of such notice became part of the contract. And as parties might by contract vary the responsibility of the carrier to any extent, the carriers by means of such notices managed to avoid responsibility in regard to a great part of their most risky traffic. Such notices may still be used with effect in the case of sea carriage, but, as will be seen, they are no longer of any value in regard to land carriage. The difficulty with regard to such a notice is to prove that the consignor of the goods ever had knowledge of it. But where such knowledge can be proved, and where a consignor delivers goods to a carrier, having such knowledge, it is only reasonable to conclude that he tacitly consents to be bound by its terms.

CARRIAGE BY LAND

The Carriers Act.—In the year 1830 was passed a very important Act of Parliament known as the Carriers Act, which was amended so far as railways are concerned by the Railways Act, 1921. By these Acts it is provided that no common carrier by land being a railway company shall be responsible for the safety of certain kinds of goods, where the value of such goods contained in one parcel or package exceeds the sum of £25,[1] unless the consignor at the time when he delivers any such parcel or package to the carrier makes a

[1] In the case of carriers other than railway companies the value is £10, as originally provided by the 1830 Act; and in the following pages £10 must be read for £25 where such carriers are concerned.

declaration of the value and nature of such things contained in the parcel. If he make such declaration, then the carrier is entitled to charge a sum over and above the ordinary rate of carriage, which is to be paid as compensation for the increased risk the carrier runs in carrying such things. The carrier must by notice posted at his receiving office publish the particulars of such charges, or else he is not entitled to demand them. He must also, if required, give a receipt for the parcel.

The articles to which this provision applies are: Gold or silver coin, gold or silver in a manufactured or in an unmanufactured state, precious stones, jewellery, watches, clocks, trinkets, bills, bank-notes, orders, notes or securities for the payment of money, stamps, maps, writings, title deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, furs, and hand-made lace. Where a parcel contains any of these things to the value of more than £25, and no declaration of value of the contents is made by the consignor, the carrier is not responsible for loss or injury, even though such loss or injury is due to his own negligence. If the consignor make the required declaration and pay the insurance, the carrier is under full liability as an insurer of the goods. Where the parcel contains articles in the above list to the value of over £25 mixed with other things which are not in the list and no declaration is made, the carrier in case of loss or injury must pay compensation in respect of the goods not in the list, but is under no liability for the things in the list. For example, if a lady's trunk were lost on a railway journey, and it contained a valuable sealskin jacket, lace, and jewellery, amounting in total value to much more than £25, and also a large number of other things of kinds not mentioned in the list, and if no declaration with regard to the value or contents of the trunk were made by the lady, the company could not be compelled to compensate her for the loss of the sealskin, the lace, or the jewellery, but would have to compensate her for the other things. A parcel containing things in the list is

within the Act although no single thing in the parcel is worth as much as £25, provided that all the things in the parcel of the kinds mentioned in the list exceed in total value the sum of £25. It is sometimes difficult to say whether a particular thing comes within the Act or not. But in cases of difficulty this question is always one of fact and not of law. For example, a parcel was sent to a carpet manufacturer containing hand-painted designs for carpets. These designs were of great value, and the parcel was worth about £150. It was lost on the railway, and the owner brought an action against the company for its value. The question was whether these designs were "paintings" within the meaning of the Act. It was held that in fact these designs were not works of art but merely trade models, and therefore not paintings in the ordinary sense in which the word is used as meaning pictures. The railway company were therefore held to be responsible for the loss of this parcel, and not to be protected by the Act.[1]

With respect to undeclared goods of the kinds mentioned the Act protects the carrier from having to pay damages in case of either loss or injury. Now "loss" may either be permanent or temporary. For example, goods may be lost sight of and found again after a time, and then delivered by the carrier. The carrier is protected from having to pay damages for such temporary loss as well as for permanent loss. But the Act gives the carrier no protection where he is liable for delay in the delivery of goods and the delay is not caused by the goods having been lost.

Where goods have been declared and the insurance paid, the consignor cannot, in case his things are lost or destroyed, recover more than the amount he declared to be their value. On the other hand, the carrier is not bound by the declaration of value, and is entitled to put the owner of the goods to strict proof of their value.

Although the Act originally applied only to common carriers

[1] *Woodward* v. *London & North-Western Railway Co.*, 3 Ex. D. 121.

by land, it applies now to all railway companies who carry by water as well as by land. Therefore in the case of a company which contracts to carry from Birmingham to Belfast, the Act applies to the sea portion of the journey precisely as to the land portion.

The Act affords the carrier no protection where goods are stolen by a servant of the carrier, or where they are destroyed by any other criminal act of the servant. But where the owner of goods included in the Act which have disappeared wishes to make the carrier responsible, although the nature and value of the goods were not declared, on the ground that the goods were stolen by a servant of the carrier, he must prove that they were so stolen. It is not sufficient for him to prove that they must have been stolen, and that probably the thief was a servant of the carrier On the other hand, he need not bring the crime home to an individual servant. If he can show that the goods were stolen, and that the thief must almost necessarily have been some servant of the carrier, though he cannot identify the individual, the carrier will be responsible, and will lose the protection of the Act.

The Act also contains an important provision with regard to other goods than those mentioned in the list. It provides that no notice posted up in a carrier's office or receiving-house shall have any effect in limiting the liability of a carrier for goods carried. It further provides, however, that nothing in the Act is in any way to prevent the carrier and the consignor from making a special contract with regard to any consignment of goods. If any such contract be made, the relationship between the carrier and the consignor is governed by the contract in the first instance. And if anything in the contract is inconsistent with the Act, the Act does not apply But the Act does apply in all respects in which it is not inconsistent.

Conditions Limiting the Carrier's Liability.—Although in 1830, when the Carriers Act was passed, railways were only just beginning, in a few years after that date the railway

system of the country was in full operation, and railway companies managed to do a large amount of business under special contracts which relieved them of much of their liability. This they managed by handing to a consignor, at the time goods were delivered to them for carriage, a ticket or consignment-note referring to the goods. This note often contained written or printed conditions which relieved the company of a great part of their liability. But if such a document were accepted without objection by a consignor, he was usually considered by the Courts to have assented to the conditions, and to have entered into a special contract with regard to the goods. The result was that consignors often found themselves saddled with very stringent and unreasonable conditions, which perhaps they had never in fact read or become aware of. To remedy this state of things the Railway and Canal Traffic Act, 1854,[1] was passed, which provides that no contract which is aimed at limiting the responsibility of a railway or canal company for loss of or injury to any goods by the negligence or default of the company or its servants shall be good unless it is in writing signed by the consignor or his agent, and unless the conditions of the contract are just and reasonable in the opinion of the Court by whom the question may be tried. The conditions which are void unless signed and unless reasonable are any conditions which seek to excuse the company from the consequences of any negligence in regard to the receiving, carrying, or delivering of goods. Such a contract, although perfectly reasonable, is void unless it is in writing signed by the consignor or his agent. Any such contract, although in writing and signed, is void unless it is just and reasonable.[2] Therefore, it is no longer possible for the company by special contract to throw all risks of conveyance, however caused, upon the consignor. The great difficulty in applying this provision lies in deciding what is the meaning of "just and reasonable."

[1] 17 & 18 Vict. c. 31.
[2] *Peek* v. *North Staffordshire Railway Co.*, 10 H. L. 473.

To a certain extent each case must depend upon its own facts, but certain broad rules have become well established. The policy of the law is, that railway companies must, if required, carry all ordinary goods for a reasonable sum at their own risk, so far as the safe delivery of the goods is concerned. If the railway company is willing to do this, but is ready to offer the consignor some substantial advantage as an inducement to him to excuse the company from some part of its liability, such an offer, if accepted, and if the arrangement is put into writing and signed by the consignor, may be valid. Goods are carried by railway companies either at "company's risk" or at "owner's risk." In the first case, the company carries usually as common carrier, or at all events with full responsibility for negligence. In the second case, the company is not liable where the goods are injured, even though the injury be caused by negligence. There are two rates for many descriptions of goods: the company's risk rate and the owner's risk rate; the latter being considerably the less. If, then, a consignor has the alternative open to him either to send his goods at the company's risk for a reasonable sum, or to pay a substantially smaller sum and relieve the company of liability for negligence, and if he choose the latter alternative, probably he has made a contract which will be considered just and reasonable, and binding upon him.

Other reasonable alternatives may, however, be offered to a consignor besides an alternative of rates. For example, a company is not bound to carry many classes of goods unless they are properly packed. This applies to furniture, glass, and a very great number of things. If, then, a person bring to a railway office damageable goods which are not properly protected by packing, the company may refuse to accept them in such condition. But instead of refusing it may offer to the consignor an alternative, *i.e.* either that he shall take the goods away and have them properly packed, or that the company shall carry the goods in their then existing state on condition

that the company shall be relieved of liability for negligence. If the consignor accept this latter alternative, he is saved the expense of having the goods packed, and also having to pay a higher rate for a heavier weight; and in return for this saving he agrees that the goods shall go at owner's risk. Such an alternative is usually just and reasonable.

But in order to be just and reasonable, each of the alternatives must be such as a consignor is in his own interests likely to accept. If one alternative is unfairly burdensome on the consignor, and therefore not likely to be accepted, it is no real alternative, and he has no real choice. For example, Dickson sent a dog worth £60 by railway from London to Newcastle. He signed a consignment note or contract which stated that the company would not receive dogs for conveyance except on the terms that it should not be responsible for any amount of damages for the loss thereof, or for injury thereto, beyond the sum of £2, unless a higher value were declared at the time of delivery to the company and a percentage of 5 per cent paid on the excess of value beyond the £2 so declared. No declaration of value was made, and the ordinary fare of 6*s*. alone was paid. The dog was injured, and Dickson sued the railway company for damages. The company admitted liability to the amount of £2, but denied that they were liable for more. The question for the Court was whether the contract which Dickson signed was a reasonable one. To answer this question the Court had to decide whether Dickson had had a fair alternative offered to him. Now it is clear that in order to have the dog carried at the company's risk Dickson would have had to pay £2 18*s*. in addition to the ordinary rate for carriage of 6*s*. So that the alternative offered to him was that the dog should be carried for 6*s*., the company taking no risk beyond the amount of £2, or that he should pay £3 4*s*. for the carriage of the dog at company's risk. This charge was so large that no one was likely to accept such an alternative. Therefore in the opinion of the Court no real alternative was offered to Dickson at all.

Therefore his contract was not a reasonable one, and was consequently invalid. Therefore the company, not being protected by any contract, was liable for the full amount of the damage to the dog.[1] But in another case, in which the facts were almost the same, except that the percentage payable for the carriage of the dog at company's risk rate was 1½ instead of 5, the Court held that, considering the risky nature of the traffic, a fair alternative had been offered to the owner of the dog.[2]

When a consignor sends goods by railway without signing any contract, or otherwise making any special agreement, the railway company carries the goods with the full liability of a common carrier. A trader, however, is usually required to sign a contract, or consignment note, which contains certain conditions.

If the goods are to be carried at company's risk these conditions do not affect the company's responsibility for the safety of the goods, but are of an auxiliary character, such as a condition giving the company a general lien for charges,[3] or a condition dealing with warehousing of the goods after the transit is complete. If the goods are to be carried at owner's risk the company must obtain a signed contract if they wish to avoid liability for negligence. This owner's risk consignment note contains a provision that the company shall not be liable for loss, damage, misdelivery, delay or detention, except upon proof that such loss, damage, etc., arose from wilful misconduct on the part of the company's servants. The companies, however, accept responsibility where the goods are never delivered at all, unless they can prove that such non-delivery was due to fire, collision, wreck of ship, or other such cause. The Railways Act, 1921, made important changes in the law on this subject. Under that Act a special court is constituted, called the "Railway Rates Tribunal," with wide powers of controlling

[1] *Dickson* v. *Great Northern Railway Co.*, 18 Q. B. D. 176.
[2] *Williams* v. *Midland Railway Co.*, (1908), 1 K. B. 252.
[3] See p. 185, *post*.

charges and conditions of carriage. Standard contracts and conditions for all railway companies have now been settled. They are comprised in two Forms, Form A and Form B. Form A contains the conditions applicable to goods carried at company's risk rates. Under these conditions the company is liable for all loss, misdelivery or damage occasioned during transit unless the company can prove that the loss, misdelivery, or damage arose from act of God,[1] act of war or the king's enemies,[2] arrest or restraint of princes or rulers[3] or seizure under legal process, orders or restrictions imposed by the Government, act or omission of the trader or his servant or agent, latent or inherent defects or vice[4] or casualty (including fire or explosion). Even where any of the above causes was in operation the company will not be relieved of liability unless it can prove that it used all reasonable foresight and care in the carriage of the merchandise, but the company will not be liable where there has been fraud on the part of the trader Form A applies in all cases unless there is an "owner's risk" rate in operation, and the company has been requested in writing to carry at that rate, or the company and the trader have made a special contract in writing. Form B contains the conditions applicable to goods carried at owner's risk. The most important are that the company shall not be liable (subject to certain stated exceptions) for loss, damage, deviation, misdelivery, delay or detention of or to a consignment or any part thereof except upon proof that the same arose from the wilful misconduct of the company or its servants, and that the company shall not be liable for loss or injury from whatever cause arising of or to any articles or property described in the Carriers Act 1830[5] contained in any parcel or package when the value of such articles or property exceeds £25 unless the nature and value thereof be declared on delivery and an increased charge paid or agreed

[1] For the meaning of this term see p. 165. [2] *Supra*, p. 165.
[3] *Post*, p. 193. [4] *Supra*, p. 166. [5] *Supra*, p. 168.

to be paid. The reasonableness of these standard conditions cannot be disputed. It is, of course, usually very difficult to prove wilful misconduct. The expression wilful misconduct means something much more serious than negligence or carelessness even of a gross kind. Wilful misconduct means the doing of some act which the person doing it must know is likely to be injurious.

Through Traffic.—Railway companies are bound in proper cases where lines are continuous to give the public facilities for the carriage of goods on a journey extending over more than one railway system, under one contract, and for one rate. Where a railway company contracts to carry goods to a place on another railway company's system, the contracting company (unless protected by contract) is responsible for the goods throughout the whole journey, and is liable to pay damages if the goods are not safely delivered at their destination. A railway company is, however, not bound to undertake responsibility for goods which have left its control. Therefore, as a condition of contracting to carry to a place on another company's line the contracting company is entitled to insist on the consignor relieving it of liability from the time it hands the goods over to the other company. Such a condition may be good if assented to by the consignor, although not signed by him. In a case of this sort, however, if goods are damaged in transit the contracting company will have to pay for the damage, unless it can prove that the goods were handed over uninjured to the second company. So that if there is no evidence as to the part of the transit on which the goods were injured, the contracting company is responsible, and not protected by the condition. But if it can be proved that the goods were injured by the second company, the second company is responsible. Where a contract for through carriage at owner's risk is made, all companies upon whose lines the goods are carried are entitled to the benefit of the contract.

Railway companies often contract to carry goods on a journey partly by railway and partly by sea—as from Manchester to Paris, or London to Dublin. Where this is so, a condition which relieves the company from liability during the sea part of the journey for injury due to dangers peculiar to the sea may be good although not signed by the consignor, provided the condition is posted in the company's receiving office and printed on a receipt or note given to the consignor.[1]

Rates and Charges.—A common carrier may in general demand such payments for his services as he can obtain, subject only to the rule of common law that his charges must not be unreasonable. With railway companies, however, it is different. The Railway Rates Tribunal, already referred to, has power to fix and determine all charges, and a company can only make charges so authorized. "Rates" are the charges made in respect of the carriage of goods, but charges may also be made for other services, as for loading and unloading at the private sidings of a trader, for collecting and delivering outside a company's station, for weighing goods, for the detention of wagons or the occupation of sidings beyond a reasonable time, etc.

For the purpose of fixing charges all merchandise is divided into classes, and the charges are the same for all articles in the same class. In allotting any article to a certain class consideration is given to such matters as its value, its bulk in relation to its weight, its liability to damage, the ease with which it can be handled, etc. The rates payable must, of course, depend largely on the weight of a consignment and the distance it has to be carried. The principle is to charge a certain sum per ton, per mile, for the first 20 miles, a less sum for the next 30 miles, a still less sum for the next 50 miles, with a further reduction for the remainder of the distance; so that the rate per ton per mile decreases with the distance

[1] Regulation of Railways Act, 1868, s. 14.

carried. Terminal charges for loading, etc., do not, of course, vary with the length of the transit.

The classification of goods, as well as the fixing of charges, is controlled by the tribunal; and the charges are intended to be fixed so as to allow the companies to earn the same dividends as they earned in 1913, the last complete year before the Great War.

The rates and charges authorized by the tribunal are " standard " charges, and cannot be varied by the companies, either upwards or downwards. The tribunal may, however, allow " exceptional " rates, lower than the standard rates, to enable a company to meet competition by sea, to encourage the consignment of goods in large quantities or in full train loads, or packed in such a manner as to simplify handling, and for other such reasons. No company may, however, unduly prefer one trader to others desiring to forward similar goods in similar circumstances. For similar services similar charges must be made, and no favour must be shown to individual customers.

All companies are obliged to keep books at their stations containing the classification of merchandise and the rates chargeable. These books must be open without payment to all persons interested

Dangerous Goods.—No railway company is obliged to carry dangerous goods, except ammunition, etc., for the Crown. In case of dispute the tribunal decides whether goods are dangerous or not. If it carry them, the company is entitled to make such bye-laws and regulations as it may think fit in regard to the conveyance, storage, etc., of such goods; and the consignor is liable for all damage or injury to the company's servants caused by non-compliance with such by-laws and regulations, unless such damage or injury is proved to be due to wilful misconduct on the part of the company's servants.

Cattle and Horses.—By the Act of 1854 as amended by the Railways Act 1921 it is provided that a company shall not be answerable beyond the sum of £100 in respect of any horse

which it may carry, or £50 for any ox or cow, or £5 for any other animal, unless at the time of delivering any such animal to the company, the consignor declares that the animal is of a higher value than the sums mentioned. If he make such declaration, then the company is entitled to charge a percentage on the value of the animal as declared in excess of the sums mentioned, according to a notice which must be posted up of such charges.

Unless and until such declaration of value is made, a railway company is not liable beyond those sums for injury to any such animal suffered from negligence either in the receiving or forwarding or delivering of the animal. For example, Hodgman sent his groom with a valuable racehorse to a station to be forwarded by railway. On arriving at the railway yard a servant of the company told the groom to take the horse across the yard to an office, which he pointed out. While the horse was being led across the yard to this office, and before the groom had had any opportunity of declaring the value of the horse (as he meant to do on reaching the office), the horse was fatally injured by negligence on the company's part. Hodgman brought an action against the company for over £1,000, but it was held that he was not entitled to more than £50,[1] as the negligence of the company was negligence in receiving the animal, and no declaration of value had been made at the time of the injury.[2]

Delivery to Carrier.—In order to make a carrier responsible for his goods the consignor must be careful to deliver the goods to the carrier. Delivery to a servant of the carrier is delivery to the carrier and makes the carrier responsible, provided the servant has authority to receive the goods. If a man were to deliver a parcel outside a railway station to a man who was a servant of the company, but who had no authority to receive parcels, and if that parcel were lost, the railway company

[1] £50 was the maximum until raised to £100 by the Act of 1921.
[2] *Hodgman* v. *West Midland Railway Co.*, 35 L. J. Q. B. 85.

would probably not be responsible for it, because it never was delivered to the company. But delivery at an office, or any place which the railway company holds out to the public or recognizes as a place for the reception of goods, is delivery to the company, provided the person in the office who receives the goods is apparently acting for the company in the office.

A consignor must also see that all goods which require packing in order to be safely carried are properly and securely packed. If goods are injured in transit because they were not properly packed the damage is the fault of the consignor himself, and for such damage the railway company is not responsible. If the company can see when goods are delivered that they are not properly packed it can refuse to carry them, or (as has been already stated) may consent to carry them only at owner's risk. But if the improper packing can easily be seen, and nevertheless the company accept the goods without objection, it cannot afterwards escape liability for injury arising from the quality of the packing, to which the company could have objected, but to which it refrained from objecting.

A consignor is also bound to label or address goods with so full and complete an address as will enable the company readily to find the consignee. If the address be faulty, or ambiguous, or wrong, and on that account the company fail to deliver the goods in proper time, or deliver to the wrong person, the company is not responsible for any damage which follows.

Any person who tenders goods to a carrier for carriage is bound, if required so to do, to pay all charges for the carriage. A carrier is under no obligation to accept goods unless the consignor is prepared to pay the charges at the same time as the goods are delivered.

Delivery to the Consignee.—As has been already stated, a carrier is bound, unless excused by contract, to deliver the goods safely to the consignee. The carrier is an insurer of safe delivery, and is also bound to deliver without unreason-

able delay. But the carrier is not an insurer against delay. Therefore even when not protected by contract, a carrier is only responsible for damage caused by delay when it can be proved that the delay is due to negligence on the carrier's part. If delay is caused by matters outside the carrier's control the carrier is not responsible Of course, if a railway company undertake to deliver goods by a certain time it must observe its contract. But unless there is such an undertaking the obligation upon the company is merely to deliver within a reasonable time. An agreement to carry goods by a certain train which is advertised to arrive at a certain time is not of itself an undertaking that the goods shall arrive at their destination at that time. Questions often arise as to loss of market. If a carrier accept goods with notice that they are for a certain market, and does not protect himself by contract, he may be liable for the consequences if the goods arrive late for the market. But loss of market may easily happen where there has been no unreasonable delay in dealing with the goods. So that loss of market may occur without negligence on the carrier's part, and therefore a condition in a contract that a railway company shall not be responsible for loss of market where there is no negligence on its part is a condition which may be binding although not signed by the consignor, as it does not attempt to excuse the company for liability for negligence.

Where a railway company is liable to pay damages for delay the question as to the amount of the damages is often a very difficult one. It is clear that very serious consequences may often result from delay in the delivery of goods—consequences sometimes out of proportion to the value of the goods. If a company is liable for delay it is only liable for such damages as are the natural consequences of the delay. It is not liable for damages which are due to extraordinary circumstances of which it had no knowledge. But if there are extraordinary circumstances which are brought to the

knowledge of the company when it receives the goods, and if the company accepts the goods with notice of the consequences which may follow delay because of the unusual circumstances, it may be responsible. For example, Hadley was the owner of a mill at Gloucester. One day the crank-shaft of the engine which set in motion all the machinery of the mill broke. Hadley thereupon sent a clerk to the office of Pickfords to arrange for the conveyance of the broken shaft to the manufacturers of the engine at Greenwich. The clerk told Pickfords that they were anxious to have a part of a machine delivered at Greenwich as soon as possible, and was told that if it was handed to Pickfords before 12 o'clock it would be delivered without fail next day at Greenwich. The clerk did not tell Pickfords that the mill necessarily stood idle for want of the broken shaft. Through the negligence of Pickfords the shaft was not delivered for several days; and as it was sent to the manufacturers as a pattern for a new shaft, the new shaft was not delivered to Hadley for several days later than it would have been if Pickfords had carried out their arrangement. The result was that Hadley lost so many days' net profits of the working of the mill, which he would not have lost if the carriers had fulfilled their contract. For these profits he brought an action against Pickfords; but it was held that as the carrier did not know that the mill was kept idle for want of the shaft, they were not responsible for such extraordinary consequences of their delay in delivery of the goods.[1] In another case, Collard sent a quantity of hops to the London Hop Exchange by the South-Eastern Railway Company. There was an unreasonable delay of several days in delivery of the hops, and during those days the price of hops on the market was rapidly falling from day to day. In consequence when the hops were delivered and sold on the market they fetched £65 less than they would have fetched if they had been delivered without unreasonable delay. It was held that the loss of this £65 was a natural and ordinary

[1] *Hadley* v. *Baxendale*, 9 Exch. 341.

consequence of the railway company's negligence and that they were liable to pay that sum to Collard as damages for their delay.[1]

Delay and even total loss are often caused by misdelivery, that is, delivery to a wrong person. If the carrier deliver goods at the place to which they are addressed he is not, as a rule, bound to inquire whether the person who receives the goods at that place is authorized to receive them or not. Delivery at the place of address is usually a complete fulfilment of the carrier's contract. But if the carrier deliver to a person at the place of address who cannot reasonably be thought to have authority to receive the goods, the carrier may be responsible. For example, if a railway company took a parcel to a house and found that the house had just been burnt out and was in charge of a salvage man it would be rash of the company to deliver the parcel to the salvage man. There is no general rule that a railway company must deliver goods at the house of the consignee. Sometimes the house is a long distance from a station and outside the radius within which the company usually delivers. The company is, however, bound to deliver at the house if such delivery is within its usual course of business. If it do not deliver at the house then it should give notice to the consignee of the arrival of the goods and give him an opportunity of fetching them. This, however, is very often not possible, as when goods are sent addressed only to a station "to be called for." In such cases it is presumed that the consignee is expecting the goods, and it is his duty to claim and remove them within a reasonable time after their arrival.

Liability of Carrier after Transit.—If a consignee does not remove or accept the goods within a reasonable time of their arrival at the station of destination, the responsibility of the railway company as carrier is at an end. Its responsibility as carrier lasts during the transit. The transit includes more

[1] *Collard* v. *South-Eastern Railway Co.*, 30 L. J. Ex. 393.

than the actual time occupied by the journey. It is in law considered to begin the moment the company accepts the goods for carriage. It includes any time during which the goods are in the hands of the company for the purpose of carriage before the journey has commenced; it includes, of course, the actual journey; and it also includes the time which elapses after the goods have arrived at the station of destination until their delivery, or the expiration of such time as it is reasonable to allow the consignee to remove the goods. The consignee cannot extend the legal period of transit for his own convenience. Where there is a special contract with regard to goods the usual agreement is that the transit shall in no case extend beyond (*a*) the time that goods carted by the company are unloaded or tendered at the address to which they are consigned, or (*b*) the expiration of twenty-four hours after notice of arrival of the goods posted by the company is due for delivery to the consignee in the ordinary course of post or after notice of arrival is given to him personally or is delivered at his address, whichever shall be first, or (*c*) when goods are consigned to the order of the sender, or his address is unknown, the expiration of 24 hours after the arrival of the goods. When the transit is at an end the carriers are responsible for the goods as warehousemen, not as carriers. As warehousemen they are bound to take good care of the goods, and may charge a reasonable sum for so doing, but they are not responsible if the goods are injured without any negligence on their part. For example, goods were sent to a railway station addressed to Chapman "to be called for," and on arrival were placed by the railway company in the station warehouse. After having been there three days the goods were destroyed in a fire which burnt the warehouse down. It was held that the company was not responsible for the goods; for, as the consignee had not removed them within a reasonable time after arrival, the transit was at an end; the liability of the company as common carrier was therefore at an end; and it was

not responsible unless negligence could be proved against it, which was not possible in this case.[1]

Recovery of Charges by Carrier.—As has been said, no carrier need accept goods for carriage unless the consignor prepay the charges If, however, the carrier accept the goods without prepayment and without any definite agreement as to payment, he is entitled to withhold delivery of the goods to the consignee until the charges are paid; he is also entitled to refuse to return them to the seller on the buyer's insolvency (see p. 128). This right to withhold delivery until payment of charges is called the "Carrier's Lien." The right only extends to charges for the carriage of the actual consignment of goods retained. Thus, if a consignee were already indebted to a railway company for the carriage of one lot of goods, and a second lot of goods were carried by the company for the same consignee, the company would have no right to withhold delivery of the second lot of goods until it was paid the carriage of the first lot In other words, the carrier's lien is a *particular* lien, and the carrier can only retain a consignment of goods as security for the payment of the carriage of those goods He has no right to retain goods in order to enforce payment of his general account against the consignee. The carrier may, however, have such a right by agreement. In that case he is said to have a *general* lien, and in most contracts made with railway companies there is a condition that the company shall have the right to hold the goods of the consignee as security for any moneys due to it by the consignee.

If goods are delivered without payment, the only remedy of the carrier is, as a rule, to sue for the carriage. Then, as the carrier has usually no contract except with the consignor, the action must, as a rule, be brought against the consignor. The consignee is only liable where the consignor was acting as his agent in forwarding the goods. Of course, in many cases the consignor and the consignee are the same person.

[1] *Chapman* v. *Great Western Railway Co*, 5 Q. B. D. 278,

CARRIAGE BY SEA

The owner of a general (*i.e.* unchartered) ship [1] is a common carrier, and as such (if not protected by contract) is an insurer of the goods, unless loss or damage arises from the excepted causes. Loss by act of God is much more common on sea than on land; it includes everything independent of the act of man which cannot be reasonably foreseen, or which, if foreseen, cannot be guarded against—as storm and fog. It need not be violent. For example, if a ship be obliged to sail near the shore, and through a sudden failure of wind she become unmanageable and drift on to the rocks, this is an act of God. But the carrier is not entitled to avoid liability for loss due to the excepted causes if by proper care he might have avoided the loss. Therefore, if a ship fall into the hands of the enemy's warship by reason of the negligence of the captain, the owner will be responsible for the goods lost by capture. The carrier will not be excused, either, where the loss would not have occurred except for the fact that without good reason the captain deviated from the proper course of his voyage, or where the loss would not have occurred except for the fact that his ship was unseaworthy at the commencement of the voyage.

Carrier's Liability.—The carrier by sea is not liable in respect of goods jettisoned. Sometimes, in order to save a ship and the rest of the cargo from threatened danger, some of the cargo has to be thrown overboard and abandoned. This destruction of goods by intentionally and properly throwing them overboard is called "jettison." But although the shipowner is not liable for failing to deliver safely goods jettisoned, both the ship and the rest of the cargo are liable to contribute, according to their values, to the amount of the loss of the owner of the jettisoned goods. So that the loss is shared equally *pro rata* by all concerned.

Under Merchant Shipping Act.—By the Merchant Shipping

[1] See pp. 189, 194.

Act, 1894, the carrier by sea is entitled to protection in other cases. Thus, where any goods being carried on board his ship are damaged by reason of fire which breaks out on board without any actual fault on his part, the carrier is not responsible. Also, where gold, silver, diamonds, watches, jewels, or precious stones are carried on a ship, the owner or consignor of such things is bound to declare to the owner or master of the ship the nature and value of such goods. This declaration must be made either in a bill of lading or in some other writing. If such goods are sent by ship without such declaration, the carrier is not responsible for loss by theft or other cause happening without his actual fault or privity.

The Merchant Shipping Act also places a limit on the total liability of a shipowner for loss for which he is answerable without any actual fault or privity on his part, whether the loss happen on board his own ship or on another ship with which his ship collides. In respect of loss due to any one wreck, collision or other such accident, the total liability of the shipowner cannot exceed £15 for each ton of his ship's tonnage, for loss of life, personal injury, and damage to vessel or goods. The total liability in respect of goods and damage to another ship cannot exceed £8 for each ton of his ship's tonnage. If claims are made against the shipowner in respect of loss of life and personal injuries, and also in respect of damage to goods or another vessel, the claimants for loss of life and personal injury will be entitled to £7 a ton of the ship's tonnage; and all claims will rank equally against the other £8 a ton. Therefore the claimants in respect of loss of life and personal injury having exhausted the £7 per ton, may prove for the balance equally with the claimants for loss of goods and damage to vessel against the £8 a ton. Where such claims are made against the shipowner he may pay the total amount of his liability into Court; then the various claims are ascertained, and the amount available is distributed *pro rata* amongst the claimants according to the value of their claims.

Under the Carriage of Goods by Sea Act.—Other rights and immunities are conferred on the carrier by the Carriage of Goods by Sea Act, 1924, which applies to goods carried by sea from any port in Great Britain or Northern Ireland to any port, whether in or outside Great Britain or Northern Ireland. Under this Act the carrier is not liable for loss resulting from a large number of acts and circumstances of which the following may be noted : acts of neglect or default of the master, pilot, or servants of the carrier in navigation or management of the ship, fire, unless caused by actual fault or privity of the carrier, perils of the sea, acts of God, acts of war, public enemies, quarantine restrictions, faults of the shipper, strikes and lock-outs, latent and inherent defects, saving life or property, or any other cause without actual fault or privity of the carrier or his servants or agents. The carrier is not liable for deviation in saving or attempting to save life or property at sea, nor in any event for loss or damage exceeding £100 per package or unit unless the nature and value of the goods have been declared before shipment, and inserted in the bill of lading.

On the other hand, the carrier must make the ship seaworthy (though he does not warrant her seaworthiness if he has employed due diligence), properly man, equip, and supply the ship and make all parts in which goods are carried fit for their reception.

Notice of loss or damage must be given in writing by the consignee at the time of his taking possession, or within three days if the loss or damage is not apparent, and, in any event, the carrier is discharged from all liability within one year after delivery of the goods or after the date when delivery should have been made.

The carrier's rights and liabilities under this Act may be surrendered or increased by special agreement if the surrender or increase be embodied in the bill of lading.

The Contract.—Large quantities of goods are carried by land without any special contract being made with regard to their

carriage. But few goods are carried by sea without a special contract being made between the consignor and the shipowner. Speaking generally, a shipowner employs his ship in one of two ways. First, as a general ship, when the ship is announced to be about to proceed on a defined voyage and to be ready to take the goods of any persons who desire to ship goods in her. A contract is usually made with the shipper (or consignor) in respect of each consignment of goods. This contract is called a bill of lading. Secondly, the ship is let by the owner to a person who hires the whole carrying capacity of the ship, so that the ship and her master and crew are put at the disposal of the hirer for a certain time, or for a certain voyage. The contract by which the services of a ship are let and hired in this way is called a charter-party, and the hirer is called the charterer. Every ship is under the control and command of a master (or captain). The master makes contracts for the employment of the ship, he signs bills of lading and charter-parties in his own name as master, and although he is the agent of the shipowner, he is personally liable on such contracts as well as his principal the shipowner. He is also, of course, personally liable for any wrongful act by which goods are damaged, for instance, improperly jettisoning.

Carriage in a General Ship.—In the usual course of things notice is given by advertisement or otherwise as to the date of the sailing, ports of call, etc., of a general ship An intending shipper then arranges with the owner or master of the ship as to the amount of freight and terms of carriage. Freight means the pecuniary consideration payable for the carriage of goods in the ship. The shipper then delivers his goods to the person in charge of the ship, either at the docks where she is lying or into lighters or otherwise according to circumstances. In exchange for his goods the shipper is handed a document called a "mate's receipt," which acknowledges the receipt of the goods. When the goods are put on board, then the master of the ship signs a "bill of lading," which is given to the shipper

in exchange for the mate's receipt. This bill of lading contains the terms of the contract under which the goods are carried, and must be stamped with a 6*d.* stamp. Bills of lading vary in form in the case of different owners and particular trades. But although differing in many details they generally follow one type, of which this is an example—

"SHIPPED in good order and well-conditioned by Robert Lewis, in the steamship *Princess Maud*, whereof is master for this present voyage James McLeod and now lying at London, twenty packages merchandise being marked and numbered as in the margin and to be delivered subject to the exceptions and conditions at foot hereof in the like good order and well-conditioned at the port of Sydney, unto Henry Wallace or to his assigns on freight primage and average accustomed for the said goods being paid by the consignee in cash as per margin ship lost or not lost. In witness whereof the commander of the ship hath affirmed to three Bills of Lading all of this tenor and date one of which being accomplished the others to stand void. Dated in London this 21st January, 19 . . . The following are the exceptions and conditions above referred to—

"Weight Measure Contents and Value unknown. The act of God the King's Enemies restraint of Princes Rulers or Peoples restriction of Quarantine Pirates Robbers or Thieves by Sea or Land Barratry of the master or crew Accidents Loss or Damage from Vermin Fire Jettison Collision Machinery Boilers Steam or Defects latent or otherwise in Hull Tackle Boilers or Machinery or their appurtenances and all Perils Dangers and Accidents of the Seas Rivers Land Carriage and Navigation of what kind soever or loss delays or any other consequences arising from combinations of workmen or others whether ashore or afloat strikes or civil commotion or any act neglect or default whatsoever of the Pilot Master Mariners or other Servants or of the Agents of the Company or from transhipment or warehousing or from obliterations of marks or numbers or from leakage breakage insufficiency of packages or sweat or rust or injurious effects of other goods. The Ship is to be at liberty to sail with or without Pilots and to tow and assist Vessels in all situations and also to deviate from the Voyage for any purpose or to touch and stay at other ports either in or out of the way."

"(*Signed*) J. McLEOD—Master."

Liability of the Master.—The bill of lading is capable of being looked at from several different points of view. In the first place, it is an acknowledgment or admission by the master that the goods described in the bill of lading have been put on board. It is outside the scope of the master's authority to sign a bill of lading for goods which he has not received on board. If he does sign a bill of lading for goods which in fact have never been shipped, the shipowners are therefore not responsible for such goods. The master himself, however, is bound by the bill of lading, and is answerable for the value of the goods to any one who has given value for them on the faith of the master's statement that they are on board his ship. The shipowners may, however, be liable for goods which were never put on board if their agents received them for carriage, and it was by the fault of such agents that the goods were not shipped, for the liability of a carrier commences when he accepts the goods.

The Bill of Lading as a Document of Title.—A bill of lading is also a document of title to the goods, *i.e.* its possession is evidence of a right to the possession of the goods.[1] It is a symbol of the goods as long as they are at sea and until they have been delivered to some person entitled to receive them. In the usual course a bill of lading is signed in triplicate; one is retained by the master, one is retained by the shipper, and the third is sent to the consignee. This third is very likely sent by post and by a quicker route than the goods; so that it probably reaches the consignee before the goods. In these circumstances, the consignee having got possession of the bill of lading, which is a document of title to the goods, may sell or otherwise deal with the goods while they are still at sea. He does this by indorsing the bill of lading and transferring it for value to the buyer of the goods. Such an indorsee then becomes entitled to the goods. He in his turn may transfer his right to a third person by delivering the bill for value to

[1] See *ante*, p. 133.

him. When the ship arrives at the port of destination, the consignee, or indorsee, or holder of the bill of lading, should be ready to receive the goods. He proves his right to receive them by producing the bill of lading to the master. The master then compares it with the one he has retained, and if they correspond it is his duty to deliver the goods to the person producing the bill on payment of the freight and other charges due. The bill of lading is, therefore, in the nature of a negotiable instrument; but it is not really a negotiable instrument, for a person transferring it can give no better right to the goods than he has himself.

Although there is in fact no contract except with the shipper, the consignee has the right to sue for the goods, or for damage to the goods, or otherwise, as if the contract had been made with him, and the indorsee of the bill of lading who is entitled to the goods has a similar right. Where the goods have been shipped by an unpaid seller and consigned to the buyer, in case of the buyer's insolvency the seller has a right of stoppage *in transitu*. But if while the transit still continues the consignee re-sell the goods and indorses the bill of lading for value to a second buyer, who acts in good faith and without notice that the goods have not been paid for, the seller's right of stoppage is lost as against this indorsee

Conditions of the Bill of Lading.—A bill of lading also is evidence of the terms of the contract between the shipowner and the shipper. The contract is to carry and deliver the goods safely and without unreasonable delay, subject to any special conditions and limitations contained in the bill. Such conditions are generally expressed in the bill of lading itself, but they may be contained in some other document referred to in the bill of lading. For example, the bill of lading may be expressed to be subject to the conditions contained in a charter-party. In that case the conditions in the charter-party are considered to be incorporated in the bill of lading. It may be noticed that the conditions in a bill of lading are none the less binding because they are unreasonable.

Nearly all bills of lading begin with the words "shipped in good order and condition." If these words were not qualified by any others the master might be bound to deliver goods in good order and condition even though he had not so received them. Hence it is usual to insert the words "weight, measure, contents, and value unknown," or to insert the word "apparent" after "shipped." Then the shipowner is bound to deliver the goods in the same condition as to weight, measure, etc., as he received them and not otherwise.

It is almost invariable for the shipowner also to protect himself from liability for loss arising from a large number of causes—from dangers peculiar to navigation—from dangers peculiar to the use of steam—from defects in hull, machinery, and appurtenances—from the effects of strikes or riots, and so on.

"Restraint of princes, rulers, and peoples" covers any act of a State or Government which interferes with the course of the voyage. For example, the blockade of a port, the seizure of goods as contraband of war, quarantine regulations, or the putting an embargo, *i.e.* a restraint, on a ship. Thus, at the time that war was declared between China and Japan a ship was on a voyage to Japan carrying amongst other things explosives for the Japanese Government. The master on reaching Hong Kong landed the explosives and continued his voyage to Japan with the rest of the cargo. If he had not done so he ran the risk that Chinese cruisers would seize the contraband goods and very likely seize and retain the ship herself. In an action by the shippers against the shipowners for their breach of contract to carry the explosives to Japan it was held that the risk of the goods being seized did amount to a "restraint of princes." [1]

"Barratry" means any wrongful act wilfully committed by master or crew in relation to the ship or cargo. For example, intentionally wrecking the ship, or setting her on fire, deviating

[1] *Nobel's Explosives Co.* v. *Jenkins* (1896), 2 Q. B. 236.

from the proper course of the voyage for the master's private purposes, fraudulently selling the cargo, or any such act.

"Primage" means certain small payments which used generally to be paid to the master for taking care of the cargo. Very often, however, nowadays these payments are not demanded, and the master is remunerated entirely by salary. "Average accustomed" means the share of certain expenses which are usually borne by the ship and cargo according to their respective values, such as the expenses of towage.

Charter-Parties.—Ships are chartered in various ways. Sometimes the ship is hired outright, so that the whole control and possession of the ship are transferred to the charterer. The master and crew are the servants of the charterer, and the charterer is almost in the same position as an owner, having the right to use the ship for any proper purpose he pleases which is not inconsistent with his agreement. A contract of this description is not a contract for carriage at all, but amounts for all practical purposes to a lease of the ship herself.

In the next place, ships are chartered by a contract made between the owner and the charterer, by which the charterer acquires the use of the whole ship so far as her carrying power extends for the carriage of his goods. By the terms of such a charter-party the owner only agrees that the ship shall be at the disposal of the charterer for the carriage of goods. The charterer gets no right to control the ship, or the master, or the crew, in regard to the manner in which she is to be navigated. The master and crew remain the servants of the owner, and the owner acts as carrier of the charterer's goods. Such a charter-party is usually either for a certain definite voyage or for a certain time. The following is in outline an example of an ordinary charter-party for a certain voyage:—

London, 25th March, 1931.

It is this day mutually agreed between *J. Brown & Co.* owners of the good steamship called the VIOLET A1 of tons burden whereof *W. Richardson* is master now at *London* and *T. James & Co.* merchants.

1. That the said ship being tight, staunch, and strong and every way fitted for the voyage shall proceed with all reasonable dispatch to *Newport* and there load always afloat a full and complete cargo of coal (say about tons in weight) and being so loaded shall forthwith sail and proceed with all dispatch to *Riga* or so near thereto as she can safely get and deliver her cargo as ordered always afloat.

2. The cargo is to be loaded in working days from the *time in which notice is given that the ship is ready to load* and days to be allowed the charterers over and above the said lay days for loading for which they shall pay £ per day demurrage.

3. The Act of God, etc. (*excepted perils similar to clause in bill of lading*).

4. The ship to have liberty to call at any ports to tow and assist vessels in distress or to deviate for the purpose of saving life or property.

5. The cargo to be taken from alongside by consignee at port of discharge free of expense to the ship at the average rate of tons per working day weather permitting. Time to commence when notice is given that the ship is ready to unload.

6. The freight to be paid at the rate of per ton (ship lost or not lost) in cash by the consignee.

7. General average to be settled according to the York-Antwerp rules, 1890.

8. The Charterer's liability shall cease as soon as the cargo is shipped and demurrage in loading (if any) is paid, the master

and owners having a lien on the cargo for freight demurrage and average.

Signed, etc.

Witnessed, etc.

This document must be stamped with a sixpenny stamp. The provisions of the contract and the meaning of some of the expressions used will now be considered.

The expression "now at" is important as indicating the whereabouts of the ship at the time the charter-party is made. The importance lies in the fact that the charterer calculates the time when the ship should arrive at the port of lading from his knowledge of where she is when the charter is made.

"Tight, staunch, and strong and in every way fitted for the voyage." These words constitute an express warranty that the ship is seaworthy, and that at the time of shipping she is in every way fit to receive the intended cargo. Such a warranty was formerly implied by law in all cases, but where the Carriage of Goods by Sea Act, 1924, applies,[1] the owner is no longer under an absolute warranty that the ship is seaworthy, but if loss or damage arises through unseaworthiness he must prove that he used due diligence to make the ship seaworthy, and to secure that the ship was properly manned, equipped and supplied, and that the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried were fit and safe for their reception, carriage and preservation.

The expression "always afloat" means that the ship shall not be required to lie in any port where she cannot in all conditions of the tide lie afloat when fully loaded. In the case of a large vessel this condition is also probably implied, for the sake of the safety of the ship.

"A full and complete cargo." As the charterer usually has to provide the cargo, and to pay freight, which is calculated

[1] *Ante*, p. 188.

at so much a ton, it is of great importance to the shipowner that a full cargo should be loaded, for otherwise he loses part of the expected freight. It must in every case be a question of fact whether or not the cargo loaded was a full cargo. Where such words are used as "say about 1,000 tons," it has been decided that a cargo weighing within 3 per cent., more or less, of the 1,000 tons satisfies the engagement.

"So near thereto as she can safely get." These words are inserted to protect the shipowner from having to take the ship into a port where she cannot lie in reasonable safety. Where these words are used the shipowner does not undertake absolutely that the ship shall arrive at a named port. Therefore, if the master finds that there is not enough water for his ship to cross a bar at the mouth of a river, or that there is any other obstacle preventing him reaching an agreed port, he may require the consignee to accept delivery of the goods at some point short of the port, but as near as he can reasonably be required to get. The obstacle, however, which will justify a master in refusing to proceed must be one of a permanent character. If the obstacle be a temporary one, and the ship by waiting a reasonable time can get to the port, she ought to wait.

Demurrage.—The work of loading and unloading a ship is generally carried out by persons employed by the shipowner. But it is the duty of the shipper to bring the goods to the ship, and of the consignee to be ready to receive them at the port of discharge. As a ship's time is so valuable, it is usual to provide that a certain number of days shall be allowed for loading and discharge. These days are called "lay days." Where "days" are mentioned in a charter they are consecutive days, unless the context shows a contrary intention. "Running days" are also consecutive days, including Sundays and holidays. "Working days" are all days on which work is accustomed to be done in the particular port. Therefore Sundays and holidays are excluded. What are working days

must depend on the country and the customs of the port; for a day may be a working day in one port and not in another. For example, the 17th March—St. Patrick's Day—is a working day in Bristol, but not in Cork. "Weather working days" are working days on which work is not stopped by the weather. The charterer undertakes that, as far as he is concerned, the loading shall be complete within an agreed number of lay days. But it is usual to agree that if he require a few more days, not exceeding a stated number, he shall be entitled to have those extra days for an agreed sum per day. This sum is called "demurrage." And the agreed payment for additional days is alone strictly called demurrage. The charterer is within his contract in detaining the ship for any time not exceeding the agreed number of days, provided he pay the agreed demurrage. But if he delay the ship beyond the agreed number of days he commits a breach of contract, and is liable to an action for damages for detaining the ship. Such damages are commonly but less correctly also called demurrage. If no lay days are mentioned in a charter-party, the shipper must be allowed a reasonable time for the loading and discharge of the cargo, but will have to pay damages if he delay the ship beyond a reasonable time.

The Cesser Clause.—The clause number 8 in the form of charter-party is called the "cesser clause." The person responsible for demurrage or detention of the ship, either in loading or unloading, is primarily the charterer. Where there is delay in unloading the consignee may also be liable. It is, however, often the intention of the charterer that his responsibility shall come to an end as soon as he has provided the agreed cargo. To carry this intention the cesser clause is inserted; and this frees the charterer from liability for anything which occurs after he has provided the cargo.

Freight.—The money payable for the carriage of goods in a ship is called "freight." Where goods are shipped without any bill of lading, or where the bill of lading contains nothing

as to the time of payment of the freight, freight is payable only on delivery of the goods at the port of discharge. The master must be ready to deliver the goods before he can demand the freight. But the right to freight is usually provided for by express agreement in the bill of lading. If the shipowner has failed to carry the goods to their destination, although such failure is due to causes beyond his own control, he is not entitled to freight unless by express agreement. Nor in the absence of agreement is he entitled to freight where the goods have, from any reason, perished or been destroyed upon the voyage. For example, freight would not be payable for the carriage of cattle which died during the voyage, not even if their carcasses were carried to the destination; for the contract was to carry live animals. But where goods are merely damaged, not destroyed, on the voyage, freight is payable when the master is prepared to deliver them, and it is no defence that the goods are so damaged that they are not worth the freight payable It is often a difficult question whether the goods have been merely damaged or whether they have been destroyed If the goods have so lost their identity as not to be merchantable under the description by which they were shipped, they must be considered as destroyed. If they are merchantable under that description, even though damaged, freight is payable. For example, a ship loaded with dates sank in the Thames, and the dates became saturated with foul water. They were in consequence unfit for human food, and were therefore not merchantable as dates, though they had a considerable value for distilling. It was held that no freight was payable.

If the shipper interfere and prevent the voyage being completed, freight is payable, although the goods are not brought to their destination. For example, if the goods were temporarily landed at an intermediate port to enable repairs to be effected, and the owner took possession of them and refused to allow them to be carried to the destination, freight would be

payable as if they had been carried to the destination. It sometimes happens that goods are delivered at a port short of the agreed destination by mutual agreement. For example, a cargo of coal for Hong Kong is by agreement delivered at Singapore. In such a case the original contract is abandoned in part by mutual consent; but a new contract is implied from the facts, *i.e.* to pay freight according to the services actually rendered. Such freight is called "*pro rata* freight."

It is not unusual for freight to be payable by agreement by the shipper before the voyage has commenced, or perhaps within a certain number of days after the ship has sailed. Such freight is called "advance freight." If not paid as agreed, it can be recovered from the shipper even though the ship and cargo be lost. And if it be paid as agreed, and the ship be lost, it cannot be recovered, though there may be a counter-claim for the loss of the goods. Freight is usually calculated by weight or measurement, but sometimes it is a fixed sum irrespective of amount. Such sum is called "lump freight." Where freight is payable by weight, and a charterer agrees to supply a full cargo up to a certain weight, he must pay damages if he do not ship a full cargo, as compensation for the wasted space in the ship. Such compensation is called "dead freight."

Average.—In a sea voyage three classes of interests are usually concerned: the interest of the owners of the ship, of the owners of the cargo, and of the persons entitled to freight payable on the cargo. It sometimes happens that in order to avoid a danger which threatens ship and cargo and the interests of all concerned, some part of the property at risk must be sacrificed. For example, it is sometimes necessary to throw cargo overboard or to cut away masts in a storm; it is also sometimes necessary to flood a ship with water to extinguish fire. In such a case, where part of the cargo, or part of the ship, is intentionally destroyed or abandoned in order to save the rest, and for the advantage of all the interests at risk, the

loss is said to be a " general average " loss, and all owners of property in danger and saved by the act must bear their share of the loss and contribute to it *pro rata* according to the value of that property. Where property is damaged not for the general benefit, the loss must be borne by the interest concerned or according to contract. Such loss is called " particular average." General average is usually calculated according to a body of rules agreed to by the representatives of various countries, and known as the York-Antwerp Rules, 1890.

Lien.—The shipowner has a lien upon the cargo for his freight and other charges which he may have properly incurred in preserving goods. His lien exists independently of any express agreement; and where there is an express agreement as to payment of freight, the lien still exists, unless it is inconsistent with the agreement. The lien exists for freight due either under a bill of lading or a charter-party. The lien also extends without any agreement to general average. It extends to the whole of the cargo carried on one voyage for which freight is payable by the same consignee. Therefore the consignee is not entitled to have a portion of the goods delivered on tender of a corresponding part of the freight, and the master may refuse to deliver any of the goods until the whole freight is paid. By agreement, lien is often given for demurrage, for dead freight, and other things.

As the lien is merely a passive right to retain goods, it is obvious that it must often be difficult for a ship to enforce her lien except at the cost of much delay. A ship cannot wait to recover freight which there is a difficulty in getting, and cannot wait when the consignee does not come forward to accept delivery of the goods. In such cases the shipowner would run the risk of losing his lien by landing the goods and sailing away, unless some provision were made by law for protecting his rights. Accordingly it is provided [1] that in such cases the shipowner may land the goods and deposit them in a ware-

[1] By the Merchant Shipping Act, 1894.

house or on some wharf. If they are goods subject to duty they must be deposited in a bonded warehouse. Then notice in writing is given to the warehouseman, or wharfinger, that the goods are subject to a lien for freight and other matters mentioned in the notice to the amount specified. The goods then cannot be obtained from the warehouse or wharf until these charges are paid, and are subject to the lien as long as they are in the warehouse or wharf. If the charges remain unpaid for ninety days from the time that the goods were deposited, the warehouseman may sell the goods, or enough of them to satisfy the charges, by public auction. Before they are sold, however, he must advertise the sale in newspapers, and also, if possible, send a notice of the sale by post to the owner of the goods. If the goods are of a perishable nature, the warehouseman may sell them by public auction as soon as is necessary to avoid loss, and without any notice or advertisement. Where the goods are sold by auction, the proceeds of the sale must be applied by the warehouseman as follows, and in the following order: (1) In payment of duty, if the goods are dutiable and sold for home use; (2) in payment of the expenses of the auction; (3) in payment of the charges of the warehouseman; (4) in payment of the amount claimed by the shipowner for freight and other charges The surplus, if any, must be paid to the owner of the goods.

Salvage.—When a ship is in peril at sea, one who saves or helps to save the ship is entitled to a reward. This reward is called "salvage," a word which is also used to denote the property saved. The right to salvage arises from services rendered to a ship in peril either at sea or in a river or harbour. But the right only arises in regard to a ship or the cargo of a ship; therefore persons who save a raft of timber which has got adrift are not entitled to salvage. The principle of rewarding salvors is founded on the desire to encourage persons to risk even their own lives and property to assist ships in distress. Hence the reward is generally large. Persons who are only

doing their duty under a contract, or acting in their own interests, are not in general entitled to salvage. Therefore the owners of a tug which is engaged to tow a ship out of a dangerous position are not, as a rule, entitled to salvage. Neither is the owner of a ship which rescues another ship belonging to himself. If nothing is saved no salvage is earned, however great the exertions of the would-be salvors; but the salvage is a charge upon whatever property is saved.

Salvage is earned in many ways, such as by towing, by personal services on board, or by taking cargo off a wreck. It is obvious that salvors often expose, not only themselves, but their own ship and cargo, to great danger and also to delay. The amount earned is fixed by the Court, and depends on the risk run, the difficulties of the work, the value of what is saved, and other considerations. The salvage has to be provided by the owners of all the property which was in peril and was saved. Therefore not only must the owners of ships and cargo contribute, but also the owners of freight, when freight has been saved. Salvage is usually awarded in one sum, and then each part of the property saved must bear its share of the burden in proportion to its value.

Not only are the persons who actually render the services entitled to participate in the salvage, but also the owner of the ship, the owner of the cargo, and the owner of any property subject to risk or loss in consequence of the services.

Collision.—Collision at sea is a very common cause of loss; and when cargo is lost or damaged by collision the owners of such cargo often have a right of action against the owners of one or both of the ships engaged.

A collision may be an accident, due to the forces of nature or misfortune and not to any negligence. In this case loss must be borne where it falls. Again, it may be entirely due to the fault of one ship. If the collision is due to the fault of the ship carrying the cargo the shipper may, or may not, have a claim for damages against the shipowners according to his

contract; but generally the contract protects the shipowner. If, however, the fault was entirely on the other ship, then the shipper has a right of action for damages against the owner of that ship, and his claim is a charge upon the ship. Again, faults on the side of each ship may have brought about the collision. In this case the shipper has a right to recover half his loss and no more against the other ship, and it depends on his contract whether he has any claim against the carrying ship.

PART XI

INSURANCE

Nature of the Contract.—There are numerous contingencies of life which, though of rare occurrence compared with the number of persons liable to be affected, may bring disaster to an individual when they do occur. Against loss from such contingencies persons protect themselves by insurance. Insurance consists in passing on the risk to some other person who, for a consideration, generally very small in proportion to the value of what is exposed to risk, contracts to indemnify the person paying against loss. For example, out of a large number of houses it is extremely unlikely that any particular house will be burnt down in a named year, but it is probable that one or more will be so destroyed. If, then, the owner of each of these houses pay some person a small sum in return for which he contracts to indemnify against loss the owner of any house which is burnt, the risk of loss by fire is shifted from the owner to this person; and the money required to indemnify the owner of the burnt house is provided by the payments of the whole body of owners.

The person who undertakes a risk in such a manner is an insurer or underwriter, the person who seeks to protect himself from loss is the assured, the payment made by the latter to the former is called a premium, and the contract is a policy of insurance. The premiums are, of course, fixed in proportion to the risk, and if properly calculated are sufficient to provide a profit for the insurer after satisfying all claims.

Except in life insurance and insurance against personal injury by accident, the principle of insurance is indemnity. The assured is not entitled to make any profit out of his

disaster; the most he can require is to be put in as good a pecuniary position as he would have been if the disaster had not happened. Therefore in theory it is to the interest of both assured and insurer that the disaster should not happen; and it is clear that any other principle would supply a temptation to crime and fraud.

An insurer seldom undertakes to indemnify the assured completely; he usually limits the amount which he can in any event be called upon to pay to a certain sum. Again, he is liable to pay only actual loss; so that if the thing insured is only partially destroyed, or merely damaged, he discharges his liability by paying for the injury done. If, however, he pay the whole value of the damaged thing he is entitled to have it surrendered to him in order that he may realize what he can out of what is left. When a claim is made by an assured he is liable to be called upon by the insurer to prove strictly the amount of his loss or the value of the thing destroyed. The insurer is not bound to take the owner's valuation of his property, and is as a rule only bound to indemnify. Sometimes, however, but generally in marine insurance, the parties agree at the time the contract is made as to the value of the thing. The policy is then called a "valued policy," and the insurer cannot afterwards contest the value of the thing unless he is prepared to allege fraud.

An insurer generally insures against certain named risks, and it is only in respect of these that a claim can be made against him. Thus an insurance of a house against loss by fire gives no claim to the owner in case his house is destroyed by an earthquake; an insurance against personal injury by accident while travelling in trains or steamships gives no claim to a person injured in an aeroplane.

Difficulty often arises in deciding whether a loss has arisen from a peril insured against or from some other cause. The rule is that the nearest cause must be taken into account, and not a remote cause. Thus, if A insure his shop and stock

against damage by fire, and a fire breaking out next door causes a crowd to collect who break his window and pilfer his goods, A cannot recover, for the fire was the indirect and not the nearest cause of the loss. On the other hand, where the immediate cause is the natural or necessary result of the peril insured against, he may recover. On this principle, an insurance against loss by fire covers loss caused by throwing on water to put out the flames, and an insurance against death by accident has been held to cover death from pneumonia, where pneumonia was the direct result of an accident.

It is the duty of the assured in case of danger to use such means as are reasonably available to save the insured property. Thus, if a man's house is on fire he must not stand by and let his property be destroyed, if he can do anything to arrest the progress of the fire by summoning the fire brigade, or minimize loss by removing valuables. He is not bound to run any risk; but if he wilfully abstain from saving his property without reasonable excuse he is guilty of a fraud on the insurer and is not entitled to indemnity under the policy.

Subrogation.—It sometimes happens that when insured property is destroyed or damaged the assured has some right to compensation or indemnity against a third person, quite independent of any insurance If the insurer in such a case pay the loss, he has the right to enforce the claim of the assured, in the name of the assured, against the third person. This right of the insurer is called subrogation. For example, when A has insured his motor-car against injury on the road, and his car is negligently run into and damaged by B, he has a right of action for damages against B. He may, however, call upon the insurer to pay the damage and refrain from enforcing his claim against B. If, then, the insurer pay A under the policy, he by subrogation may bring an action against B in the name of A for damages for injury to the car. If he receive a sum less than he has paid to A he is indemnified to that extent; if he receive more than he has paid to A he must

account to A for the excess. Of course, if B pay damages to A, the amount which A can recover from the insurer is reduced by the amount of damages received. Again, when goods are insured in transit by sea or land and are lost, the owner has perhaps a right to recover the value of his goods from the carrier. If, then, the insurer pay the owner the value of the lost goods, he has by subrogation the owner's right to recover such value from the carrier. In any such case the third person who is sued by the insurer is entitled to avail himself of any defence which he would have had against the assured if he had been sued by him. The assured must not in such cases renounce his rights against the third person or make any agreement with him which defeats the rights of the insurer. If the assured does make any such agreement with the third person he must account to the insurer for what the insurer loses by being deprived of his rights.

Life Insurance.—It has been said above that insurance is generally a contract of indemnity. An insurance policy on a man's own life is, however, an exception to this. It is a contract by which in consideration of periodical payments to be continued for a fixed time, or for the life of the assured, the insurer undertakes to pay a certain sum on the death of the assured. Such a contract is usually made for the benefit of the dependents or relatives of the assured, sometimes for the benefit of his creditors. Now it is perfectly obvious that a man cannot be indemnified for the loss of his own life, so this contract is not one of indemnity. It is a contract which enables a man to save money for the benefit of others and at the same time secure those others from the risk of not getting the money by reason of his premature death.

The sum secured by a policy of life insurance cannot be recovered if the assured be put to death by process of law, or if he commit suicide while of sound mind. Neither can the sum be recovered by the person entitled to benefit by the death of the assured if he murder the assured.

As a man cannot be indemnified for the loss of his life, so he cannot really be indemnified for the loss of a limb, or for any other bodily injury. It is impossible to put a money value on such injuries. Therefore a policy which secures to the assured a certain sum in case of personal injury by accident is not a contract of indemnity. In either of these cases the full sum insured is payable on the happening of the event on which payment depends, and no inquiries as to amount of loss are relevant.

When an insured man is killed by accident due to the negligence of another, his widow and children have a right of action for damages against the negligent person for the loss they suffer by his death. But although in general their right is limited to their pecuniary loss, the defendant in such an action is not entitled to have any benefit which the plaintiff's gain from the fact that the deceased's life was insured taken into account in estimating the damages.

Insurable Interest.—By the Life Assurance Act, 1774, persons are forbidden to make contracts of insurance when payment depends on any event in which the person to be benefited has no interest, or by way of gaming or wagering; and every insurance made contrary to this provision is null and void. It is further provided that where the assured has an interest, no greater sum shall be recovered than the value of that interest.

A person has an interest in an event whenever he will suffer a loss or reap an advantage in case the event happens. If he effect an insurance upon an event in which he has no such interest the transaction is a mere wager. If, then, an event happens against which an insurance has been effected, the assured is not entitled at law to recover anything from the insurer if he did not stand to lose anything by the event. But just as bookmakers cannot be prevented from paying debts, so insurers cannot be prevented from paying without making inquiries into the interest of the assured, and this in fact is often done.

The interest which a man has in his own life has already been referred to. It cannot be measured in money, and for whatever sum he insures his life, his representatives can recover that sum from the insurer.

But with regard to a policy on the life of another the position is different. If A insure the life of B and have at the time no interest in the life of B, he is not entitled to recover anything on his policy when B dies. And if A have an interest in the life of B. but insure that life for a sum in excess of such interest, he can only recover the value of his interest. If, however, A have an interest in B's life at the date of the policy, the fact that A loses that interest before B's death does not affect A's right to recover on the policy. A creditor has an insurable interest in the life of his debtor, which is measured by the amount of the debt at the date of the policy. If the debtor pay the debt in his lifetime the right of the creditor to recover on the policy at the death of the debtor is not affected.

A person has always an insurable interest in the life of a relative who is bound in law to support him, or who does in fact support him. It is always presumed that a woman has an insurable interest in her husband's life, and a man in his wife's life. A son has an insurable interest in the life of his father who supports him; but a son has no insurable interest in the life of a father whom he supports.

Where a person insures his own life, any person to whom he *bona fide* assigns the policy, whether for value or otherwise, has a right to recover the amount insured; but for his own protection the assignee must give notice in writing of the assignment to the insurer.

In the case of fire insurance the assured must have an interest in the property insured both at the date of the policy and also at the time of the fire. Therefore if a man insure his house against fire and sell the house, and the house is burnt down after he has sold it but while its policy is still

in force, he cannot recover on the policy. The assured has no right to assign a fire policy without the consent of the insurer.

A master has an interest in the personal safety of his servants and can insure against liability under the Workman's Compensation Act or otherwise. An employer also has an interest in the honesty of his clerks and can insure against loss by their dishonesty.

A factor has an insurable interest in the goods entrusted to him for sale, but if they are destroyed and he recover their value from the insurer he must account to the owner for the balance of what he has received after satisfying his own claim in respect of the goods.

A person who is one of two co-sureties for the debt of another has an insurable interest in the life of his co-surety to the extent of the amount he may possibly have to pay if the co-surety die.

The Contract of Insurance.—Except in the case of marine insurance there is no statutory enactment which makes writing generally necessary for the validity of a contract of insurance, and a verbal promise to grant a policy may be enforceable. The Stamp Act, however, requires an insurer to issue a stamped policy, and therefore practically all contracts of insurance must be in writing It is usual for the parties to agree in writing as to the terms of the policy before the formal policy is issued. In such a case the policy must correspond with the agreement. It is generally a term of the agreement (except in marine insurance) that the insurer undertakes no risk until the premium is paid; and when there is this term it is clear that if a loss occurs after the date of the agreement but before any premium is paid or a formal policy issued, the insurer is not liable. When, however, a policy contains a condition that it shall not be binding until the premium is paid, such condition is frequently waived by the insurer, and the Court is very ready to find evidence of such a waiver.

The Court also leans strongly in favour of the waiver by the insurer of any condition providing for forfeiture of the benefits conferred by the policy. For example, when a life policy has a condition of forfeiture in case the assured goes out of Europe, and the insurer accepts a premium knowing that the assured is in New York, he cannot afterwards treat the policy as forfeited.

When the policy is obtained by the assured by fraud, the policy is, of course, voidable, and the assured cannot get back premiums he has paid. When an assured is induced to accept a policy by fraud of the insurer he can recover premiums paid, but he cannot recover premiums paid in pursuance of an illegal policy (as where the assured had no insurable interest) even if he was induced to enter into the contract by a misrepresentation of law made by the agent of the insurer, for everyone is required to know the law and no one may plead ignorance of a statute.

Disclosures and Representations.—In effecting a policy of insurance the highest degree of good faith is required on the part of the assured. The parties do not deal with one another at arm's length as do the buyer and seller of goods, but on terms of complete mutual confidence. The assured must disclose to the insurer, before the contract is concluded, every material circumstance which he knows, or in the ordinary course of business ought to know. Every circumstance is material which would influence a prudent insurer in determining whether to take the risk, or in fixing the amount of the premium. Hence the concealment by the assured of any fact, not within the knowledge of the insurer, which tends to increase the risk, is a failure to observe good faith, and may avoid the policy. Whether or not any particular circumstance is material must always be a question of fact.

Again, every material representation, or statement of fact, made by the assured to the insurer in negotiating the contract must be true. Every representation is material which would influence a prudent insurer in fixing the premium or deciding

whether he will take the risk. The assured warrants the truth of every such representation, and if it is untrue the contract is rendered void, whether in fact the assured knew of the falsity of his statement or did not know.

MARINE INSURANCE

The law on the subject of Marine Insurance is codified in the Marine Insurance Act, 1906. From a study of the forms already given of bills of lading and charter-parties, it will be seen that shipowners protect themselves so fully by their contracts that they can very seldom be liable for loss or injury to goods. Therefore goods, as well as ships, freight and other matters which are at risk on a sea voyage, are almost always insured against loss. Every risk which the bill of lading or charter-party excepts should be covered by the policy of insurance.

A contract of marine insurance is one whereby the insurer (in this case usually called the underwriter) undertakes to indemnify the assured, in manner and to the extent agreed, against losses arising from maritime perils. "Maritime Perils" is defined by the Act to mean the perils consequent on, or incidental to, the navigation of the sea, that is to say perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints and detainments of princes and peoples, jettisons, barratry and any other perils, either of the like kind or which may be designated by the policy. A policy may extend to protect the assured against losses on inland waters or on any land risk incidental to a sea voyage.

Insurable Interest.—Every contract of marine insurance by way of gaming or wagering is void. An assured must have an interest in the subject matter of the contract, or a *bona fide* expectation of acquiring such an interest. He must have an interest at the time of the loss, though he need not be interested when the insurance is effected; but if the subject matter is

insured "lost or not lost" he may recover althqugh he may not have acquired his interest till after the loss, unless he was aware of the loss at the time of the contract and the underwriter was not aware of it.

The buyer of goods has an insurable interest in the goods, even though he may have a right to reject the goods on arrival. The owner of goods may have an insurable interest in the profit to be made by their sale if they arrive safely. The underwriter has an insurable interest in his risk and may lawfully re-insure against that risk, which re-insurance is in practice of frequent occurrence. The charterer has an insurable interest in freight which will be payable to him on safe arrival of goods shipped.

If any person effect a contract of marine insurance without having any *bona fide* interest in the subject matter, or a *bona fide* expectation of acquiring such an interest, such person is guilty of the criminal offence of "gambling on loss by maritime perils," and is liable to imprisonment for six months or to a fine of £100, and also to forfeit to the Crown any money he may receive under the contract A broker through whom any such contract is effected is liable to the same penalties if he know that the assured has no interest.

The insurable value of goods shipped is the prime cost of the property insured plus the expenses of shipping and the cost of insurance.

The Policy.—A contract of marine insurance must be in writing and stamped. The formal policy, however, may be executed and issued either at the time when the contract is concluded or afterwards. Almost all insurances in this country are effected by the use of a form of policy called "Lloyd's Policy." It is a very old form, which is neither grammatical nor easily intelligible; but meanings have been given to its obscure phrases by the Courts and by usage which have become well recognized.

Contracts are very often effected through brokers. When

the owner of goods about to be shipped wishes to insure them, he supplies the particulars to a broker; the broker enters these particulars on a form called the "slip"; and the underwriter accepts liability by merely putting his initials to the slip, and writing on it the amount for which he undertakes to be liable. This slip is not the contract, but the underwriter by initialing the slip undertakes to enter into a formal contract. Hence the policy may be executed some time after the contract is arranged, or after the goods have started on their voyage. The broker is responsible to the underwriter for the premium, but the underwriter is directly responsible to the assured for the amount which may be payable in respect of losses. A marine policy must specify the name of the assured; the subject matter insured, and the risk insured against; the voyage covered by the insurance; the amount of money insured; and the name of the underwriter. It must also be signed by or on behalf of the underwriter.

A ship may be insured for a definite period of time, in which case the policy is called a "time policy", or from one place to another or others, in which case it is called a "voyage policy" A contract for both voyage and time may be included in the same policy A "valued" policy is one in which an agreed value of the subject matter is inserted In the absence of fraud such agreed value is conclusive of the insurable value as between the assured and the underwriter. An "unvalued," or "open" policy is one in which the value of the property is not inserted, but the insurer agrees to indemnify the assured for his loss, not exceeding a certain named amount, leaving the insurable value to be ascertained in the future.

Double Insurance.—Where a shipper effects more than one policy on the same goods for the same voyage, and the sums insured exceed the insurable value of the property, the assured is said to be over-insured by double insurance. In such a case he may claim payment from the separate underwriters in any order he pleases, unless he has otherwise agreed, but he must

not receive in all a total sum exceeding the insurable value of his property. Where the assured has received money under one policy, he must give credit for that sum against the value of the goods if he make a claim under another policy. Where the assured receives any sum in excess of the insurable value of his goods, he holds that sum in trust for the underwriters.

Assignment of Policy.—A marine insurance is always assignable, unless it contain terms prohibiting assignment. It may be assigned either before or after a loss. The assignee is entitled to sue upon the policy in his own name, but the underwriter sued is entitled to raise any defence which he might have raised if he had been sued by the original assured. The policy may be assigned by an indorsement written upon it.

Loss and Abandonment.—The underwriter is liable to indemnify the assured against loss, provided the loss was directly caused by a peril insured against He is not liable for loss due to a cause not insured against. For example, if a policy did not insure against war risks, an assured cannot be entitled to recover from the underwriter the value of goods seized and confiscated by the warships of a belligerent Power. The underwriter is not liable for any loss due to wilful misconduct on the part of the assured; but unless otherwise agreed, he is liable for loss due to a peril insured against, even though the loss would not have occurred but for the misconduct or the negligence of the master or crew. Unless otherwise agreed, the underwriter is not liable for loss caused by delay, nor for ordinary wear and tear, ordinary leakage or breakage, inherent vice, nor for loss due to rats or vermin. When the property insured is entirely lost or destroyed, there is said to be a "total loss." Any loss not amounting to total loss is a "partial loss." A total loss may either be an "actual" total loss or a "constructive" total loss. Where the property is so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived of it, there is an actual total loss. Where the property insured is

reasonably abandoned because its actual total loss appears to be unavoidable, or because it cannot be preserved without incurring expense which would exceed its value, there has been a constructive total loss. For example, where the goods of the assured are on a ship stranded, owing to a peril insured against, on a distant shore, so that the cost of recovering them would exceed their value when recovered, there has been a constructive total loss. Again, where the goods are so damaged on the voyage that the cost of repairing them and forwarding them to their destination would exceed their value on arrival, there has been a constructive total loss. Where there is a constructive total loss the assured may, if he please, treat the loss as a partial loss; or he may abandon the goods to the underwriter, and treat the loss as if it were an actual total loss. *But where he elects to abandon the goods he must give the* underwriter notice of abandonment. If he fail to do so, the loss can only be treated as a partial loss. On receiving such notice the underwriter on payment of the loss becomes entitled to the property, or so much of it as still exists Whenever the underwriter pays for a total loss he becomes entitled to take over the interest of the assured in whatever remains of the property.

Liability of Underwriter.—Where an assured in the case of an open policy is insured to the full insurable value of the goods, or where in the case of a valued policy he is insured to the full extent of the value fixed, the sum which he can recover is called "the measure of indemnity."

It is a common thing for several underwriters to sign a policy, each being severally liable on the policy up to the amount of his subscription, which is often but a small part of the measure of indemnity. Where the full amount for which goods are insured falls short of the measure of indemnity, the assured is considered as his own insurer as regards the balance. In case of loss each underwriter is liable for such proportion of the loss as the amount of his subscription bears to the

value of the goods as fixed by the policy in the case of a valued policy, and to the insurable value in the case of an open policy. For example, where the value of the goods is £1,000 and the loss amounts to £500, an underwriter who subscribed to the policy to the amount of £100 would be liable to pay £50 to the assured.

PART XII

PATENTS, COPYRIGHT, AND TRADE MARKS

PATENTS

WHEN a person invents some new article, machine, or process which is likely to be of use, and to be purchased if put on the market, he evidently has something of value; provided he is protected in the reproduction of his invention against the competition of other persons It has long been recognized that public policy demands such protection for inventors, in order that inventive genius may be encouraged, and so a very valuable, but intangible, kind of property has come into existence in the form of patents.

A patent is a grant from the Crown by letters patent of the exclusive right of making, using, or selling some new invention. The law on the subject is contained chiefly in the Statute of Monopolies, 1623, and the Patents and Designs Acts, 1907 to 1928.

Who may be a Patentee.—In general a patent can be granted only to the "true and first inventor" of an invention; but a grant may be to the representatives of a deceased inventor who dies without applying for a patent. A grant may also be to two persons jointly where one only is the true and first inventor.

An inventor is one whose mind has performed the act of invention, hence a corporation, which has no mind, cannot be an inventor. Hence also, if an invention be suggested by any person within the realm to another, the latter cannot be the inventor. But in law a person who receives an invention from another outside the realm and is the first to introduce

that invention into the realm is an inventor; so that "true and first inventor" includes true and first importer. The realm in this connection means the United Kingdom and the Isle of Man. A person who buys his secret from an inventor is clearly not the inventor, and is not entitled to a patent; the true inventor must apply for the patent and can then assign it to a buyer; hence a corporation may become the owners of a patent by purchase. A grant may be made either to a British subject or to an alien, and gives protection within the realm.

Subject Matter of a Patent.—It is only a manufacture that can be patented. It must be something which can be handled or a process for making something which can be handled. Invention is not the same thing as discovery. To be entitled to a patent a person must have produced some new and useful thing or result, or some new and useful method of producing an old thing or result. A principle of nature, discovered but not carried out in a manufactured thing, cannot be patented. Thus, when Galvani discovered the effect of an electric current from his battery on the leg of a frog, he made a great discovery but did not invent anything which could be patented. Again, the discovery of a new use for a machine already employed for another purpose, as the application of an old tool to new materials, is not an invention.

The invention must be new, in the sense that it has not been made known to the public or publicly manufactured, used or sold within the realm before the date of the patent. Use by way only of experiment by the inventor for the purpose of testing his invention is not public use; but if it be used before the date of the patent, even by the inventor himself, for profit, no patent can be granted

If once the public are in a position to acquire knowledge of the invention, a patent cannot be granted. An invention may be made known to the public in many ways—for example, when it is described in any book or document to which the public have access. If an invention is made known to the

public, without the inventor's knowledge or consent, by some person who has obtained the information from the inventor, a patent may nevertheless be granted to the inventor if he apply for protection as soon as reasonably possible after he learns of the publication.

It is further said that an invention must be "useful"; but this expression is very misleading and does not mean commercially useful. It merely means that the thing will fulfil the object which it is intended to fulfil—that it will work.

Application for a Patent.—Any person who claims to be the true and first inventor of an invention may apply for a patent. This he does by filling up a form of application (which may be obtained at a post office) and sending it to the Patent Office in London. Fees are, of course, payable at almost every step in the process of obtaining a patent, as well as throughout the time during which protection is given. If the application is eventually successful and a patent is granted, the date of the patent is the date of application. The chief officer of the Patent Office is the Comptroller General of Patents, Designs and Trade Marks (known as "the Comptroller"). He is assisted by a body of examiners, clerks and other officers, and all are under the Board of Trade.

The application must be accompanied either by a provisional specification or by a complete specification; and the Comptroller may require drawings to be supplied which then form part of the specification. When the application is in respect of a chemical invention, samples and specimens may be required. Every specification must commence with a title which fairly describes the nature of the invention. A provisional specification describes merely the nature of the invention. A complete specification must describe its nature particularly, in sufficient detail to enable the invention to be manufactured after the privilege has expired.

If a provisional specification is lodged with the application, a complete specification must be lodged within nine months;

but the Comptroller may grant an extension of time not exceeding another month. Failure to send a complete specification within the time prescribed is equivalent to abandonment of the application.

Every specification is referred by the Comptroller to an examiner. If the examiner report that the complete specification describes an invention which is not substantially the same as that described in the provisional specification (in other words, that there is disconformity between them) the Comptroller may refuse to accept the complete specification until it is amended, or else he may cancel the provisional specification and treat the application as having been made on the date when the complete specification was lodged.

In every complete specification there must be a clause making definite "claims" to what is alleged to be an invention entitled to a patent. Everything new in the invention must be distinctly claimed and nothing old must be claimed as new; but the mere mention of things old in the claims, or the failure to distinguish that which is old from that which is new, is not fatal to the specification

When the examiner reports that any application, specification, or drawing, has not been prepared in the prescribed manner, or that the nature of the invention is not fairly described, the Comptroller may reject the application or require amendment. If amendment be made, the Comptroller has power to direct that the application shall be dated as from the time of the amendment.

It is part of the duty of the examiner to make inquiry whether the invention claimed has been claimed previously within fifty years. If he report that it has been so anticipated the applicant must be informed of the fact, and then the applicant has the right of amending his specification so as to remove the objection. If he does not do so the Comptroller may refuse to grant. In all cases, however, before exercising any discretionary power adversely to an applicant, the Comp-

troller must first give the applicant an opportunity of being heard. An appeal lies from the decisions of the Comptroller to the Attorney-General.

Unless a complete specification be accepted within fifteen months of the application the application becomes void; but an extension of time, not exceeding three months, may be obtained. The applicant is entitled to notice of acceptance as soon as his application is accepted. He must then advertise the acceptance, and thenceforward the specifications and drawings are open to inspection at the Patent Office. From the date of acceptance the applicant has the same rights and privileges as if the patent had been sealed, except the right of bringing an action for infringement.

Grant of a Patent.—Within two months of the date of the advertisement of an acceptance any person may give notice at the Patent Office of his opposition to a grant Such opposition can only be on certain grounds, including: (1) that the applicant obtained the invention from the person opposing; (2) that the invention was claimed in a complete specification of prior date, but within fifty years, (3) that the invention is not sufficiently described in the complete specification; (4) that there is disconformity between the complete specification and the provisional specification, and that the invention claimed in the former is the same as one the subject of an application made by the person opposing between the deposit of the provisional and the deposit of the complete specification. Each party is required to leave at the office and to deliver to the other party declarations in support of his case; and either party is entitled to demand a hearing by the Comptroller.

If there be no opposition, or if the case of a person opposing be decided against him, the patent is sealed and delivered to the patentee. The date of the patent is the date of the application. If the opposition be successful no patent will be granted.

Register of Patents.—A register is kept at the office of every

patent granted, containing various particulars—such as the name and address of the patentee, particulars as to any assignment, licence, extension, or revocation, and statements as to the payment or non-payment of fees. This register is open to inspection by the public, and is *prima facie* evidence of the matters contained in it.

In the Act, the word " patentee " means the person for the time being entered in the register as the grantee or proprietor of the patent. Any person alleging that he is aggrieved by the insertion in, or the omission from, the register of any matter, may apply to the High Court for relief.

Duration of Patent.—The protection afforded by a patent lasts for sixteen years from its date. This date may be extended by an order of the High Court on the patentee's petition, which must be presented at least six months before the expiration of the sixteen years. Any person interested is entitled to oppose the extension asked for. The Court, in dealing with the matter, inquires particularly whether the patentee has been adequately remunerated for his invention, and takes into consideration the value of the invention to the public and all the circumstances of the case.

An extension may be for a further period of not exceeding five years (or, in exceptional cases, ten years), or else the Court may order the grant of a new patent subject to such restrictions and conditions as the Court thinks fit. No second extension can be granted.

Where a patentee invents an improvement in his original invention, he may obtain a " patent of addition " instead of a new patent. By so doing he saves fees, but the patent of addition ceases with the original patent.

Certain fees are payable during the period annually after the fourth year. If a patentee fail to pay any fee at the time prescribed, the patent comes to an end, but an extension of the time for payment, not exceeding three months, may be obtained.

Licences.—The patentee may grant a licence to any person to work and use the patent. Such licence may be limited either as to place or time or otherwise. A licence ought to be by deed, but may be effected in any other way. It is unlawful for a licence to contain any provision forbidding the licensee to use any thing, or class of things, supplied by any person other than the licensor; or requiring the licensee to obtain any thing, or class of things, not within the patent from the licensor. A licence can, of course, be terminated by mutual consent; but it cannot be revoked by the patentee unless by its terms it is expressed to be revocable.

Assignment of a Patent.—A patentee may assign to another all or a portion of his right. Such assignment must be by deed; and should be entered in the Register in order fully to secure his interest to the assignee.

An assignee may grant licences, he may petition for an extension of time, or he may bring an action for infringement.

Revocation of a Patent.—The Court may order a patent to be revoked on the petition of any person who proves that it was obtained in fraud of his rights, or that he was in fact the true and first inventor, or that he had publicly manufactured, sold, or used the thing patented before the date of the patent, or in the circumstances mentioned in the next paragraph. Within two years of the grant any person may apply to the Comptroller to revoke the patent, and the Comptroller may so revoke it on proof of any facts which would have justified him in refusing a grant.

Abuse of Monopoly.—Where a patentee abuses the monopoly rights conferred upon him, any person interested may apply to the Comptroller for relief.

The patentee will be held to have abused such rights if, without good excuse, the invention is not being worked on a commercial scale in the United Kingdom after four years from the grant of the patent; if the working of the invention on a commercial scale is prevented or hindered by the

importation from abroad of the patented article; if the demand for the patented article is not being met adequately and on reasonable terms; or, if the trade or industry of the United Kingdom, or the establishment of a new trade or industry in the United Kingdom, is prejudiced by the refusal of the patentee to grant licences on reasonable terms. In cases of abuse the Comptroller may order licences to be granted on such reasonable terms as he thinks fit, or he may revoke the patent. There is an appeal to the High Court from the decision of the Comptroller.

Infringement of Patent.—If any person infringe the exclusive rights of the patentee to manufacture, use, or sell the patented thing, such person is liable to be sued by the patentee in an action at law. In such action the Court may grant an injunction restraining the defendant from such infringement, and may award the plaintiff damages for the infringement, and may also order inspection of machinery, etc., alleged to be an infringement. If a defendant in such an action prove that he had no intention to do wrong, and was ignorant of the fact that he was infringing a patent, he may be relieved from the liability to pay damages; but he remains liable to an injunction and to account for any profits he may have made.

The defendant in an action for infringement may deny that the plaintiff was entitled to a grant, and may counter-claim a revocation of the patent.

International Agreements.—The Government of the United Kingdom has entered into arrangements with the Governments of most foreign states and most of our colonies for mutual protection of inventors. Under these arrangements a person who has applied for protection for an invention in one of these countries may obtain a patent in this country in priority to all other applicants. The application must be made here within twelve months of the application in the other country. The application is made in the same manner as the ordinary application, but the accompanying specification must be a com-

plete one. No damages can be recovered by any such applicant for any infringement occurring before the acceptance of the specification in this country.

COPYRIGHT

Copyright is that exclusive right which is possessed by the author of a book or other composition to publish his work or multiply copies of his work. It resembles the right conferred by a patent in that it enables persons of ability to reap profit from their ability by securing to them the control of reproduction.

It differs from the right conferred by a patent in that it is not a privilege and is not conferred. Mr Marconi has patented some wonderful inventions, but if he had not invented these things probably some other man of science would have done so; but if Dickens had not written *Pickwick* certainly no one else would ever have written that immortal work. The author of a book, therefore, is a creator, not a discoverer or inventor, and what he has created is his property. This property he can keep to himself if he please. If he do not choose that it shall be made known to the public, no other person may make it known; and the common law gives him a right of action for damages against any person who publishes his work without his consent. If, however, he had once published his work, the common law did not protect him against persons copying that work, and he had to look for protection to statute law. That protection is afforded by the Copyright Act, 1911, under which Act now copyright can alone be claimed in the matters to which it refers.

Statutory Rights.—The Act gives copyright in every original literary, dramatic, musical and artistic work throughout the British Empire, where such work was first published in the Empire, and also in the case of an unpublished work where the author is a British subject or resident within the Empire.

In the term literary work, besides books, magazines, newspapers, etc., is included maps, charts, plans, tables and compilations.

"Copyright" in the Act means the sole right to produce or reproduce the work or any substantial part thereof, in any material form whatsoever; to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public; and in the case of an unpublished work to publish the work or any substantial part thereof. It includes the right of translation, of converting a dramatic work into a novel or *vice versa*, and of mechanically performing or delivering any literary, dramatic or musical work by means of any record, perforated roll, cinematograph film or other mechanical contrivance. Publication of any work means the issue of copies of the work to the public; and does not include the performance in public of any dramatic or musical work or the delivering in public of a lecture. Hence if a man write a play he also has the right to authorize its performance in public (for copyright includes stage right), but performance is not publication, so that the play remains an unpublished work until the author chooses to issue copies of his work to the public.

It is to be noticed that there is no necessity for an author to claim a copyright. It is his property from the moment the work comes into existence.

What is Infringement.—Infringement consists in doing anything, the sole right to do which is conferred by the Act upon the owner of the copyright, without the consent of such owner. The making or importing of any copy of a work in which copyright exists, or of any colorable imitation of such work, is infringement; so is the selling or offering for sale in the way of trade of any work by any person who knows that such work infringes copyright.

A work may, however, be copied for the purpose of private study, research, criticism, review or newspaper summary, provided that it is dealt with fairly for such purpose; and

what is fair in any particular case must be a question of fact.

There is no copyright in facts, therefore news may be repeated. Neither is there copyright in law. But there may be copyright in the arrangement of the words in which the facts are stated or in the terms in which the law is expounded.

It is by no means necessary that a literary work should have any kind of literary merit in order to be the subject of copyright. A book may be a mere compilation from sources of information open to anyone. But a second compiler must go to such sources for himself and may not copy the book. So a street directory or a trade catalogue of articles for sale may be copyright. A newspaper may publish a report of a political speech made at a public meeting without infringing the speaker's copyright; but the shorthand writer who makes a verbatim report of the speech (or his employer) owns the copyright of the report, and no other paper may reproduce it. A newspaper may also publish a verbatim report of any lecture delivered in public unless the report is prohibited. It may be prohibited by a notice posted at the entrance to the building, and also near the platform. A newspaper may publish a fair summary of any speech or lecture delivered in public.

Term of Copyright.—Copyright does not last for ever. It subsists, however, during the life of the author and for a period of fifty years after his death. But when twenty-five years have elapsed from the author's death, any person may reproduce the work for sale provided he pay royalties to the owners of the copyright at the rate of 10 per cent. on the published price; and provided he observe regulations made by the Board of Trade as to notice, and as to the mode, time, and frequency of payment of royalties.

If at any time after the death of an author the public are unable to obtain copies of a work which has been published and this is due to the owner of the copyright refusing to allow the work to be reproduced, the owner may be ordered

by the Privy Council to grant a licence for the reproduction of the work on such terms as they think fit.

Ownership of Copyright.—The author of a work is presumably the first owner of that work. Where, however, an engraving, photograph or portrait is made for valuable consideration in pursuance of an order, the owner of the copyright is the person giving the order. Again, when the author is in the employment of another person and makes the work in the course of that employment, the employer is the owner of the copyright. Thus, when the proprietor of a newspaper employs a shorthand writer to make a verbatim report of a political speech, the copyright of the report belongs to the proprietor. But when the work is an article or other contribution to a newspaper or magazine the author has a right to restrain the publication of the work in any other form, unless it be agreed otherwise. If the owner of a copyright is liable to pay royalties to the author of the work and becomes bankrupt, his trustee in bankruptcy can only sell copies of the work on terms of paying the author the same royalties as the bankrupt would have been required to pay.

Copyright may be freely assigned provided the assignment is in writing. An assignment may convey the owner's whole right, or it may only convey a limited right, *e.g.* for a certain time or for a particular part of the Empire. But no assignment by an author, unless he make such assignment by his will, has any effect beyond twenty-five years from the death of the author. At the end of the twenty-five years the copyright reverts to the author's representatives.

Remedies for Infringement.—The owner of any copyright may bring an action for infringement thereof, and is entitled to all such remedies by way of injunction, damages, accounts and otherwise as are conferred by law for the infringement of a right. He is also entitled to recover all infringing copies of his work, together with all plates for use in producing such copies. When a defendant proves that he did not know and

had no reasonable ground to suspect that copyright existed in a work he has reproduced, he is only liable to an injunction and is not liable to pay damages or to account. An action must be commenced within three years from the date of the infringement.

It is a criminal offence for any person knowingly to make for sale, or to sell, or to expose for sale in the way of trade, or to import, any infringing copy of a copyright work For such offence he is liable on summary conviction to a fine of 40*s.* for every copy so dealt with up to £50 in respect of one transaction; for a second and subsequent offence he is liable to two months' imprisonment It is also a criminal offence for any person knowingly to make or have in his possession any plate for making infringing copies of any copyright work, and he is liable to a fine of £50, and either such fine or two months' imprisonment for a second or subsequent offence.

International Copyright.—When reciprocal arrangements are made with any foreign country for the protection of copyright, the King may make an Order in Council directing that the Copyright Act shall apply to books first published in that country, and to authors citizens of, or resident in, that country, as if it were part of the British Empire.

The Order may provide that the term of copyright in the Empire shall not exceed the term provided by the law of the foreign country, and may make such other modifications as are necessary having regard to that law.

DESIGNS

There is kept at the Patent Office a Register of Designs. In this any person who claims to be the owner of any new or original design may apply to have such design registered. The law is contained in the Patents and Designs Acts, 1907 to 1928, and is intended to protect novelties of an industrial nature which do not involve the invention required for the grant of a patent.

What Designs may be Registered.—"Design" in the Acts means any design applicable to any article of manufacture or substance, whether natural or artificial. It may be applicable for the pattern, or for the shape or configuration, or for the ornament of the article. It may be applicable by printing, embroidering, weaving, sewing, modelling, casting, embossing, engraving, staining, or any other means, manual, mechanical, or chemical. The word does not include any mode or principle of construction or any mechanical device, or designs for sculpture or designing of an artistic nature forming part of a work which is the subject of copyright. The designs contemplated are of an industrial nature, and the word "design" must be interpreted in a wide sense.

No design may be registered unless it is new or original in the United Kingdom. If it has ever been published in the United Kingdom before the application it cannot be registered. A design is something which can be applied to an article. This, however, includes the shape in which an article is made; for a design applicable to a thing for its shape can only be applied to a thing by making it in that shape. Thus, a design may be registered for the shape of an iron door of a furnace, or for a brass coffin plate of a new pattern.

Whether any design is new or not is a question of fact. This question can only be answered by the eye. It is also often a question of degree. If a design, although not identical with another, is very like it, it is sometimes very hard to draw the line between colorable imitation and dissimilarity.

Registration.—The application for registration must be accompanied by representations or specimens of the design. The Comptroller may either register the design or refuse to register; but if he refuse, the applicant may appeal to the Board of Trade. If the Comptroller accept the design, it is entered in the register with the name of the applicant and as of the date of the application; and a certificate of registration is granted.

Designs are registered in a number of different classes of goods. But any design may be registered in more than one class.

Copyright in Design.—When a design is registered the registered owner has copyright in the design for five years from the date of registration. This period, however, may be extended by the Comptroller for a second and for a third period of five years.

Marking of Articles.—Before delivery on sale of any article to which a registered design is applicable the owner must cause each article to be marked in the way prescribed, so as to show that it is registered. The mark is the word " registered " or an abbreviation of that word, and in most cases also the number of the design.

Infringement.—It is unlawful for anyone, during the existence of a copyright, to apply the design, or any obvious imitation thereof, to any goods without the licence or written consent of the registered owner. Anyone who contravenes this provision is liable to be sued by the owner for a penalty not exceeding £100, or else for an injunction and damages.

TRADE MARKS

A trade mark is a mark used by a trader upon or in connection with his goods, in order to indicate that they are the goods of that particular trader. Such mark may be a device, brand, label, name, word or such like, or a combination of such things.

The Register of Trade Marks.—It is provided by the Trade Marks Acts, 1905 to 1919, that there is to be kept at the Patent Office a Register of Trade Marks in which are to be entered all registered trade marks, with the names and addresses of their owners, notifications of assignments, and other matters. This register is open to the public, and anyone may obtain a certified copy of any entry on payment of a fee.

There is also a register at Manchester for cotton goods, and at Sheffield for cutlery. Marks registered at these local registries are, however, also registered at the Patent Office.

Registrable Trade Marks.—A trade mark can only be registered in respect of particular goods or classes of goods on the application of the owner of the mark. In order to be registered it must contain or consist of at least one of the following essential particulars: (1) the name of a company, firm or individual represented in a particular manner, or the signature of the applicant or some predecessor in his business; (2) an invented word or words, or a word or words having no direct reference to the character or quality of the goods, and not being a geographical name; (3) any other distinctive mark, but a name or word (other than mentioned) cannot be deemed a distinctive mark, except by order of the Board of Trade or of the Court in the case of an old mark which has from long use come to distinguish the goods of a trader.

An invented word is one which is new at the time of registration or when first used by the person applying to have it registered. An invented word may be registered although it conveys some meaning, notwithstanding the restriction against registering words referring to the character or quality of the goods. Mere misspelling is not sufficient to make a word an invented word. Among well-known invented words which have been held to be good by the courts may be mentioned "Kodak," "Solio," and "Mazawattee." On the other hand, "uneeda" and "pirle" have been held not to be invented words. Words which cannot distinguish the goods of any particular person cannot be registered, *e g.* "pain killer." The colour of a mark may be part of the distinctive character of such mark. No mark may be registered which so closely resembles a mark already registered as to be calculated to deceive.[1]

Registration.—Any person claiming to be the owner of a trade mark may apply in writing to the Registrar to have such mark registered. If the Registrar refuse the applica-

tion, or accept it only on conditions as to amendment or modification, he must if required state in writing the grounds of his decision, and the applicant may appeal from such decision either to the Board of Trade or to the Court.

When the application is accepted it must be advertised. Within a month of the date of the advertisement any person may give notice to the Registrar of opposition to the registration, stating the grounds of his opposition. The question is then decided by the Registrar, after hearing the parties, if they so demand; and there is an appeal from the Registrar to the Court, or, if both parties consent, to the Board of Trade.

The date of registration is the date of application.

If a mark contains matter of a non-distinctive character the owner may be required to "disclaim" any right to the exclusive use of such matter as a consideration of registration.

Registration is effected for fourteen years, but may be renewed from time to time indefinitely.

Rectification of the Register.—On the request of the registered owner the Registrar has power to correct any error in the name or address of the registered owner, to cancel an entry, to strike out any goods from those for which a mark is registered, or to enter a disclaimer.

Any person aggrieved by any entry or omission or error in the register may apply to the Court for relief, and the Court may give such directions as are necessary. The Court may also order a mark to be taken off the register if there has been no *bona fide* use of it for five years.

Effect of Registration.—The registration of a person as proprietor of a trade mark gives him the exclusive right to the use of such mark upon or in connection with the goods in respect of which it is registered, and is *prima facie* evidence of the validity of the original registration. After the expiration of seven years the original registration must be taken to be valid in all respects unless it were obtained by fraud. If any person adopts or uses the mark, or a colorable imitation of it, the registered owner has a right of action against him for damages and for an injunction.

The registered owner has power also to assign the trade mark; but it can only be assigned in connection with the goodwill of the business concerned in the goods.

Offences.—Any person who represents a trade mark as registered which is not so is liable on summary conviction to a fine of £5. It is a much more serious crime, for which the guilty person may be indicted and sentenced to imprisonment for two years in addition to a fine, falsely to apply to goods any mark so nearly resembling a registered mark as to be calculated to deceive, to forge any registered trade mark, to make or have in possession any block or die for forging a registered trade mark, or knowingly to sell or expose for sale any goods to which a forged registered trade mark is applied. It is also an offence to sell imported goods bearing the name or trade mark of a British manufacturer or trader unless accompanied by an indication of origin.

Passing Off.—Quite apart from the law as to trade marks, no one may use any mark or name or get-up so as to deceive the public into thinking that goods sold by him are the goods of another person. Anyone so "passing off" his goods as those of another is liable to an action for an injunction and for damages; and it is not necessary to prove that he had a fraudulent intention. In an extreme case a man may even be forbidden to use his own name in connection with the sale of goods. This sometimes happens where by long use the name of some trader has become so firmly associated with goods of a certain class and quality that any other trader of the same name putting similar goods on the market under his name must cause confusion.

Word Trade Marks.—Where, in the case of a patented article, a word trade mark is the only practical name of the article, all right to the exclusive use of such trade mark comes to an end upon the expiration of the patent, and thereupon such word ceases to be a distinctive mark and may be removed from the register.

PART XIII

ARBITRATION

In early days, when the expense and delays of litigation were still greater than they are to-day, parties often wished to settle their disputes by arbitration instead of in the Courts. Although the Courts could not prevent parties from arbitrating, they would not readily allow their jurisdiction to be usurped, and thus it frequently happened that the unsuccessful party to an arbitration was able to appeal to the Court, thus defeating the whole object of arbitration.

In a number of special cases Parliament has decreed that disputes arising in carrying out a statute shall be settled by arbitration. In these cases a special remedy is provided for parties who would otherwise have recourse to the law-courts, and the parties must follow the procedure specified in the particular statute. Thus, a workman who seeks to obtain compensation for an accident arising out of and in the course of his employment cannot issue a writ, but must follow the prescribed procedure by submitting to arbitration. Many of these statutes relate to the public acquisition of land and similar matters.

Apart from these special Acts of Parliament there is a general statute (the Arbitration Act, 1889) which lays down the procedure to be followed when parties desire to submit a dispute to arbitration, or where the Court thinks it desirable that certain matters should be so referred. The following pages are concerned with ordinary cases of arbitration governed by the Act of 1889, whether arising by order of the Court, or by agreement. Persons whose remedy is by arbitration provided

by one of the special statutes must refer to that statute in order to ascertain the procedure to be followed.

By Order of the Court.—In three cases, namely, (1) where the parties consent, or (2) where prolonged examination of documents or scientific or local investigation is necessary, or (3) where the question in dispute consists of matters of account, the Court may refer the matter to be tried to an officer of the Court, or to an arbitrator agreed on by the parties. His decision is equivalent to the verdict of a jury.

The Court may also refer a particular question arising in the course of the hearing to an official for inquiry and report. In this case the report is not binding, but may be adopted wholly or in part by the Court.

By Agreement.—The parties to an agreement may agree to submit to arbitration any dispute that has already arisen between them, or more frequently they agree beforehand by a clause in the agreement itself to submit to arbitration any dispute that may arise in the future. Such a clause is almost invariably found in contracts of insurance. In order that the provisions of the Arbitration Act may apply, there must be a *written* agreement to submit present or future differences to arbitration. Assuming that such written agreement exists, the following rules apply :

Revocation.—The submission to arbitration can only be revoked by leave of the Court, which will only be given for some good reason, as where the appointed arbitrator is clearly unfit to act.

Appointment of Arbitrator.—Sometimes the arbitrator is appointed by name or description, as where the parties agree to submit any dispute to the arbitration of the President for the time being of some Society; or the reference may be to two or more arbitrators to be appointed jointly, or to two arbitrators, one to be appointed by each party. If no number is specified, the reference will be to a single arbitrator, and if the parties cannot agree upon the selection, or if after having

been selected the arbitrator dies or becomes incapable of acting, then either party serves the other with written notice to appoint an arbitrator within seven days, and if he fails to do so may apply to the Court to appoint one. If each party has agreed to appoint his own arbitrator, and one of them fails to do so, the other party, after giving him seven days' notice to make the appointment, may appoint his own arbitrator to act as sole arbitrator, but the Court may set aside an appointment so made.

If two arbitrators are appointed, they may appoint an umpire.

The Hearing.—The arbitrator or arbitrators must fix a time and place for hearing the case They may give preliminary directions, and often order statements to be prepared by each side to clear the issue which they have to try. The hearing is less formal than a trial in court, but though the arbitrator is not bound by technical rules of procedure he must observe the rules of natural justice, or his award may be set aside. Thus, he may not hear one side or his witnesses in the absence of the other, unless the other has had every opportunity to be present, and has wilfully and persistently refused to attend. He may not admit mere hearsay evidence, nor may he show partiality, or put himself into such a position that his interest will lie in the success of one party rather than of the other, even though there may be no evidence that he intends to act unfairly. He has power to administer oaths or affirmations to the parties and their witnesses, and to summon witnesses to attend and bring necessary documents. Any person knowingly making a false statement at the hearing is guilty of perjury.

The Award.—When the arbitrator (or arbitrators) has heard all the evidence that he requires he must give his decision, which is called making his award. He is allowed three months for this purpose, but he may extend the time by a notice in writing The arbitrator must be careful to decide

only the matter submitted for his decision. If he should decide either too much or too little the award may be set aside. The award must be in writing (unless the parties have expressed a contrary intention in their submission), but no particular form is required. The arbitrator must give his own decision. If the matter he has to decide requires technical knowledge he may take the evidence of experts, but the decision must be his own, and not that of any other person. If there are two arbitrators their decision must be a joint one. Thus, if the decision involves a point of law and a question of accountancy, and one arbitrator is a barrister and the other an accountant, the barrister may not leave the question of accountancy to be decided by the accountant, nor may the accountant leave the point of law to be decided by the barrister. If the arbitrators are unable to agree they may appoint an umpire, who must give his decision within one month after the time allowed to the arbitrators; but he too may extend the time for making his award, and the Court has always power to allow a further extension. Strictly, the umpire should hear all the evidence over again, but in order to avoid the delay and expense thus involved it is sometimes arranged that an umpire shall sit with the arbitrators and take notes of the evidence even before it is known whether the arbitrators will be unable to agree. An arbitrator is expected to regard his position as that of a judge, and not as that of the advocate of the party who appointed him.

The award must be stamped with a 10*s*. stamp. It is final and binding on the parties or their representatives (but not on strangers), and by leave of the Court may be enforced in the same way as a judgment.

Stating a Case.—It does not follow that because the parties have agreed to arbitrate they have entirely precluded themselves from all right of appeal to the Court. It is true that if a party who has agreed to arbitrate commences proceedings in a court of law in respect of the matters which he has agreed to

submit to arbitration, the other party may apply to the Court to stay the proceedings, and the Court will usually grant the application if there appears to be no good reason why the dispute should not go to arbitration; but there are other means of coming before the Court. If some question of law arises in the course of the hearing, either party may ask the arbitrator to "state a case" for the opinion of the Court, or the arbitrator may do so without request in order to obtain the guidance of the Court. If he refuses to do so upon request, the party asking him should request an adjournment in order that he may apply to the Court to compel the arbitrator to state a case If the arbitrator refuses also to adjourn, but hurries on to make his award, the award may be set aside by the Court. On the other hand, the application for a case to be stated may be made frivolously or in order to obtain delay, and in that case the arbitrator will be justified in refusing to state a case, or to grant an adjournment, and the Court will uphold his conduct by refusing to order him to state a case. An example of a question of law arising in the course of the hearing would be whether the arbitrator is entitled to hear certain evidence, or whether he may take into consideration an alleged custom as modifying a contract He may not ask the opinion of the Court on the very question which he has to decide, even though this question may itself be a question of law, for if the parties have agreed to submit a question of law to an arbitrator they must accept his decision. Moreover, any party asking for a case to be stated must do so promptly. He will not be allowed to wait until he thinks the whole case is going to be decided against him and then ask for a case to be stated.

Another way in which the opinion of the Court may be obtained is for the arbitrator to complete his award, but to present it in the form of a special case. Thus, he may decide that A's agent was guilty of a breach of duty towards B; that if A be answerable in law for his agent's breach of duty, then

that A pay B £100, but if A be not answerable in law, then that A pay nothing. He has then finished his task, and the Court has only to give its opinion and deal with the costs. An arbitrator cannot be compelled to state his award in this form, although he may be compelled to state a case for the Court's opinion upon a question of law arising in the course of the hearing.

Remitting and Setting Aside Award.—Unless the arbitrator sees fit to state his award in the form of a special case, no appeal lies from his award. In four cases, however, the Court can set aside the award, or remit it to the arbitrator for reconsideration. These cases are :—(1) Where the award is bad on the face of it. For example, an award which professes to deal with matters outside the reference, or omits to decide the very question submitted for arbitration, or is ambiguous or uncertain, may be set aside by the Court. (2) Where there has been misconduct on the part of the arbitrator. Instances of misconduct have been given above. They include, not only acts involving moral blame, such as accepting a bribe or buying up a claim, but acts of irregularity in the proceedings, such as hearing a witness in the absence of one of the parties. If, however, a party chooses to continue an arbitration without protest after an irregularity has been committed, he cannot subsequently impugn the award, unless there has been a breach of natural justice. (3) Where there has been an admitted mistake and the arbitrator himself asks that the matter may be remitted. An arbitrator cannot make a second award, altering his former award, unless the award has been remitted to him by the Court. His power of altering an award that has not been remitted is limited to the correcting of clerical errors arising from an accidental slip or omission. (4) Where additional evidence has been discovered after the making of the award. The additional evidence must be such as would have had a material effect if it had been produced, but which, for some reason, was not available at the hearing. Each party should be prepared with all his available evidence

at the hearing. If either party deliberately or negligently keeps back some part of it he cannot afterwards ask for a new trial. For example, if a party does not trouble to call an available witness because he thinks his evidence unimportant, he cannot afterwards ask for a new trial because he has changed his mind, and wishes to call him; but if, since the hearing, this witness has found a material document which would probably have the effect of altering the arbitrator's decision, the party desiring to call him would have good ground for asking that the case be remitted for a new hearing. If the arbitrator has been guilty of gross misconduct, or if, for any reason, it appears useless or undesirable to send the award back to him for a fresh hearing, the Court may simply set aside the award. An application to set aside an award must be made within six weeks after the award has been made and published to the parties. There is no time limit for an application to remit an award, but it must be made within a reasonable time.

Costs.—The arbitrator, or umpire, after giving his decision can order who is to pay the costs of the hearing (unless this power is expressly taken away from him by the submission). He usually orders the unsuccessful party to pay, but he has a complete discretion in the matter. He may settle the amount of costs to be paid by either party, or he may tax the costs, *i.e.* go through the list of expenses necessitated by the arbitration item by item, and decide which of these expenses ought to be borne by either party. He may also delegate the taxation of costs to a taxing-master, but not to any other person. The arbitrator's own fee is usually arranged beforehand, and must be paid in the first instance by the party who wishes to take up the award, for the arbitrator has a lien on his award, and can refuse to part with it until his fee is paid. It may be, however, that the award directs the other party to pay all the costs, in which case the party not taking up the award would have to refund the sum so paid as part of the costs. If the arbitrator has not arranged his fee he is entitled to reasonable remuneration for his labour.

INDEX

Arithmetic Text Books

ARITHMETIC AND ACCOUNTS

By S. CARTER, B.Com., B.Sc., Principal, Municipal Technical School, Wakefield; Examiner in Arithmetic and Accounts to the Union of Lancashire and Cheshire Institutes; and H. GARRATT, B.Sc., Head of the Physics and Electrical Engineering Department in the Smethwick Municipal Technical School. *Eighth Impressions.*

FIRST YEAR COURSE: Crown 8vo, 192 pp. Price **2s.** net.

SECOND YEAR COURSE: Crown 8vo, 288 pp. Price **2s. 6d.** net.

ARITHMETIC AND THE ELEMENTS OF COMMERCE

By S. CARTER, B.Com., B.Sc., Joint Author of "Arithmetic and Accounts." Crown 8vo, 185 pp. Price **3s.** net. This book gives expression to the ideas outlined by the Board of Education in its Memorandum on Commercial Instruction in Evening Schools (Circular 1116). It forms a suitable introductory presentation of the subject not only for evening students but also for day students in Junior Commercial Schools of every type. The emphasis of the book is on the transactions of retail trade, since that is the branch of trade with which all students—even the youngest—are, as consumers, necessarily familiar.

The Schoolmaster says: "This excellently constructed work is worthy of use by the commercial classes of every evening school in the land." *Secondary Education* says: "The book makes the strongest possible appeal, for its practical tone and its presentation of the subject, not only as a useful but as a necessary art, is bound to stimulate interest wherever it is used."

LOGARITHMS FOR BUSINESS PURPOSES, WITH TABLES

By T. J. MILLAR, M A., LL B., Chartered Accountant, Lecturer on Costing for Engineers and on Practice of Commerce, Heriot Watt College, Edinburgh. Crown 8vo. Price **1s.** net.

ARITHMETIC: A NEW VIEW

For the Business Man, Teacher and Student. By T. J. MILLAR. Crown 8vo, paper cover. Price **1s.** net.

LOGARITHMS: THEIR APPLICATION TO BUSINESS AND ARITHMETICAL CALCULATIONS

With 7 Figure Tables. By G. E. LAUNDER. Demy 8vo, 80 pp. Price **2s.** net. Limp cloth, **2s. 6d.** net.

The Schoolmaster says: "A perusal of this little book makes it evident that it is the work of a practical teacher, who in the first chapter informs the student that 'ability to understand what follows is entirely dependent upon a sound knowledge of the fundamentals.' . . . After being shown how to read tables of logs the pupil is instructed in the four fundamental processes. Succeeding chapters show the application of logs to various calculations, among which may be mentioned percentages, interest, annuities, foreign exchange, depreciation, sinking funds, etc. An Appendix deals fully with the decimalisation of money."

Banking and Foreign Exchange

THE PRACTICE AND LAW OF BANKING

By H. P. SHELDON, Certificated Associate of the Institute of Bankers. Demy 8vo, 550 pp. Price **12s. 6d.** net. *Fourth Edition.*

The book is divided for purposes of treatment into seven parts, embracing in all twenty-eight chapters, exclusive of an extensive appendix giving numerous approved forms (guarantees, mortgages, authorities, etc.) in actual use by bankers. Its comprehensiveness may be illustrated by the fact that the index to the book extends to some 32 columns of text, and comprises over 2,000 references. Moreover, the text of the book accords with the most recent legal decisions affecting bankers. It is safe to say that there is no general text-book on banking which, from all points of view, better satisfies the requirements of the modern bankman and student of banking.

This book has been placed on the list of books recommended by the Council of the Institute of Bankers for students preparing for the Institute's examinations.

ELEMENTARY BANKING

By H P. SHELDON, author of "The Practice and Law of Banking." Demy 8vo, 313 pp. Price **7s. 6d.** net *Third Edition*

This book has been written for those who are beginning the study of the law and practice of English banking, and particularly for students preparing for Part I Examination of the Institute of Bankers. It includes the full text of the Bills of Exchange Acts, 1882, 1906 and 1917.

This book has been placed on the list of books recommended by the Council of the Institute of Chartered Accountants in England and Wales to students preparing for the Institute's examinations.

THE PRINCIPLES AND ARITHMETIC OF FOREIGN EXCHANGE

By S. EVELYN THOMAS, B Com., A.C I S , Cert. A.I B., F.R.Econ.S , First Place Final Examination, "Beckett," "Charles Reeve" and "Gwyther" Prizeman, Institute of Bankers. Demy 8vo, 600 pp. *Fifth Edition.* Price **7s. 6d.** net

This book has been placed on the list of books recommended by the Council of the Institute of Bankers to students preparing for the Institute examinations, and similarly on the list of books recommended by the Institute of Chartered Accountants in England and Wales.

History

THE LEGACY OF THE ANCIENT WORLD

By W. G. DE BURGH, M.A., Professor of Philosophy, University College, Reading. Demy 8vo, xvi + 462 pp. Price **15s.** net. *Second Edition.*

The aim of this book is to introduce the general reader to a knowledge of antiquity, and to help teachers and students by indicating the lines of connection between the successive phases of what may be termed, compendiously, the Mediterranean civilisation. It sets forth the abiding value of the life and thought of Israel, Greece, and Rome. It shows how the Hebrew, the Greek, and the Roman peoples have influenced Christianity and the Middle Age, and so moulded the life of the peoples of to-day—the Hebrew contributing spiritual vision; the Greek freedom and individuality; the Roman ordered discipline. Liberty, law, and the Kingdom of God form the theme of this volume.

N.B.—A valuable feature of this book is the Bibliographical Appendix, which gives for the subject-matter of each chapter trustworthy and readily accessible English works by which the student may pursue his studies in more specialized fields.

The Times Literary Supplement says: "By this book, lucid and accurate, sober and sound, the novice might surely be inspired to fair issues It should reasonably act on youth, to use the Socratean phrases, as the gadfly sent of God to sting and wake from indolent slumbers, as the spiritual midwife bringing to birth true thoughts in the soul. Here is the lore we neglect re-shaped for us as latest knowledge bids and gaining, not losing, in the process, as some may fear. Here is rare modesty, and the moderation of good sense on the part of our tutor. The style befitting the matter is a limpid vehicle that hides itself that the high subject may prevail And there is no excuse for inattention. Mr de Burgh requires no special knowledge on our part And presently we are listening, 'like a three-year-old child.' We 'cannot choose but hear.'"

The Westminster Gazette says: "In an age of historical specialism it is remarkable to find a philosopher giving us a general history of the best sort It should appeal not only to the scholar and the academic student, but to the best minds among the workers in industrial towns whom it is designed to reach."

The Saturday Review says: "Prof. de Burgh's powers are evident in his adequate and orderly arrangement of his matter, and plain, simple language. He may be relied on for accuracy, and I am bound to say that the philosophical sections of his book are excellent. I recommend it very heartily."

Economics

THE ECONOMIC FOUNDATIONS OF RECONSTRUCTION
By ALFRED MILNES, D.Lit., Staff Lecturer in Economics to the University Extension Board. Demy 8vo, 228 pp. Price **6s. 6d.** net.
An explanation of the economic principles on which society, as we know it, is built up, and an application of those principles to the solution of the economic problems brought into critical prominence by the Great War.
The New Statesman says: "Mr. Milnes' volume is a sound and interesting exposition of economic wisdom on Free Trade, currency, the foreign exchanges, taxation, etc."

FROM GILD TO FACTORY
A First Short Course in Economic History. By ALFRED MILNES, D.Lit., Staff Lecturer to the University Extension Board, and Examiner in Economics and Economic History for the School Examinations in the University of London. Crown 8vo, 180 pp. *Third Edition.* Revised and enlarged. Price **3s.** net.
The third edition has been revised with a view to the inclusion of the results of more recent research, especially in relation to the Black Death and the Peasants' Revolt and their consequences. The book has also been enlarged, in order to cover the ground usually included in a school course and that required to be covered for the school and other elementary examinations conducted by the universities.

A PLAIN GUIDE TO INVESTMENT AND FINANCE
By T. E. YOUNG, B.A., F.I.A, Past President of the Institute of Actuaries; Past Chairman of the Life Offices' Association; late Head Actuary of the Commercial Union Assurance Co. Demy 8vo, 324 pp., cloth. Price **7s. 6d.** net. Invaluable to all students of business methods. *Third Edition.*
The third edition, which has been reset, revised and expanded, also contains an important new chapter on: "The Effect of the European War of 1914 on British Finance and Commerce."
The Financial Times says: "It is carefully and lucidly written, and anyone who desires to get a comprehensive grasp of the financial world at large and of the Stock and Money Markets particularly, cannot secure a better or more reliable guide."

AN ELEMENTARY MANUAL OF STATISTICS
By A. L. BOWLEY, Sc.D., F.B.A; Guy Silver Medallist and Vice-President of the Royal Statistical Society, 1895; Newmarch Lecturer, 1897 and 1898; Professor of Statistics at London University. Demy 8vo. Price **7s. 6d.** net. *Fourth Edition. Reset, Revised and Enlarged.*

KEY TO "AN ELEMENTARY MANUAL OF STATISTICS"
By A. L. BOWLEY, Sc.D., F.B.A. Demy 8vo Price **6s.** net. This Key provides worked solutions and explanatory notes to all the exercises in the text-book.

Other Important Books for Students and Business Men

THE ENGLISH WAY : A Text Book on the Art of Writing. By B. L. K. HENDERSON, D.Lit. (Lond.). Crown 8vo, 370 pp. Price **5s.** net. *Fourth Impression.*

This book deals in a very fresh way with the all-important subject of English Composition. The author, apart from his high academical qualifications, is specially equipped for writing such a book, since he has been teaching and lecturing upon the subject for the past twenty years. The sections on Grammar are designedly reduced to the minimum.

FIRST REVIEWS

The Midland Venture (*organ of the Midland Bank, Ltd.*) says : " Rarely has a book, dealing with a technical subject, been presented to the public in so happy and human a manner as ' The English Way ' by Dr. Henderson."

The Finsbury and City Teachers' Journal says : " Have you ever discovered a grammar book which is human ? Well, here we have found one, although it is much more than a mere text book on grammar alone."

The Scottish Bankers' Magazine says : " Many great writers, of course, drive a coach and four through the canons of the grammarian, and an outré style has not infrequently been hailed as an unqualified mark of genius, but for the work-a-day mortal who has to write a sensible letter, or report what took place at a meeting, or read a paper at the local ' Literary,' Dr. Henderson's manual is valuable in the highest degree."

LABOUR SAVING OFFICE APPLIANCES

By VINCENT E. JACKSON, Secretary of the Office Appliance Trades Association. Demy 8vo, 220 pp , including 180 pp. of Illustrations in Half-tone. *Second Edition.* Price **5s.** net.

This book deals in an authoritative way with all the latest appliances for saving manual labour in offices, and will be found useful to all those students, teachers and business men interested in business efficiency.

MACDONALD & EVANS, 8 John St., Bedford Row, London, W.C.1